Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JESSE L. NIPPER, et al.,

Petitioners,

v.

JIM SMITH, SECRETARY OF STATE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), this Court held that Section 2 of the Voting Rights Act, 42 U.S.C. §1973, applies to at-large election districts for state trial judges, and that a state's interest in maintaining its challenged system "does not automatically, and in every case, outweigh proof of racial vote dilution", but is "merely one factor" to be weighed. 501 U.S. at 427. In this case, the Eleventh Circuit, sitting en banc, held that the petitioners, black voters, could not prevail in their Section 2 challenge to two at-large election districts in Florida because the state's interest in maintaining existing at-large election districts for trial court judges outweighs, as a matter of law, any proof of racial vote dilution, no matter how strong. The questions presented are:

1. Whether, under Section 2 of the Voting Rights Act, a state's interest in maintaining at-large elections for trial judges precludes any remedy as a matter of law, without regard to the severity of the racial vote dilution shown by the evidence?

2. Whether a state's interest in maintaining existing at-large election districts for trial court judges is relevant at the liability stage of a lawsuit under Section 2, or only at the remedy stage, and, if relevant at the liability stage, what weight should it carry?

3. What are the appropriate standards for evaluating a Section 2 vote dilution challenge to at-large election districts for state trial judges?

Actual parties to the proceedings in the Court of Appeals were:

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Dot Joyce, Director of Florida Division of Elections
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Respondents herein

In addition, the following parties appeared as amici curiae in the Court of Appeals:

The United States of America
NAACP Legal Defense & Educational Fund, Inc.
The Trial Lawyers' Section of the Florida Bar

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners are black citizens and voters in Duval County, Florida, and in Florida's Fourth Judicial Circuit. They seek a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review that Court's en banc decision rejecting their challenge under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, to the use of at-large, majority white election districts with numbered posts and a majority-vote requirement to elect all of the 28 judges of the Fourth Circuit and all of the 12 judges of the Duval County Court.

OPINIONS BELOW

The December 2, 1994 opinion of the en banc Eleventh Circuit is reported as *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), and is reproduced in Appendix A to this petition. The September 15, 1993 opinion of the Eleventh Circuit panel is reported at 1 F.3d 1171 (11th Cir. 1993), and is reproduced in Appendix B. The June 2, 1992 opinion of the United States District Court for the Middle District of Florida is reported at 795 F. Supp. 1525 (M.D. Fla. 1992), and is reproduced in Appendix C.

STATEMENT OF JURISDICTION

The en banc opinion of the Eleventh Circuit was issued on December 2, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the application of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which is reproduced in Appendix D.

STATEMENT OF THE CASE

Duval County's population is 24.4% black and the population of the Fourth Judicial Circuit, composed of Duval, Clay, and Nassau Counties, is 21% black. The 28 judges on the Fourth Judicial Circuit Court are elected circuitwide and the twelve judges on the Duval County Court are elected countywide in these majority white election districts. The evidence at trial showed that no black candidate had ever been elected to the Fourth Circuit or the Duval County Court in a contested election, even though several had run. App. at 9a, 15c-16c. As the District Court found, each of those election contests was characterized by severe racially polarized voting, with the majority of black voters choosing the black candidate and the vast majority of white voters supporting the white candidate, resulting in the consistent defeat of the black candidates. App. at 23a, 90a-92a, 28c-29c. Testimony indicated there would have been additional black candidacies but for the apparent futility of running in the existing majority white election districts in the context of such severe white bloc voting. App. at 92-93a; Trial Transcript ("Tr.") Vol. 1 at 118-20; Vol. 2 at 8-14.

At the time this lawsuit was filed, only one black judge had ever served on the circuit court and only one on the county court, and both reached office by way of mid-term appointments to vacancies. Prior to the trial in this case, a second black judge was appointed to the county court, but at the time of trial still only one black judge served among the 28 on the circuit court. App. at 8a-9a, 21c.

Since 1942, circuit judges in Florida have been selected by popular election, and county court judges have generally been popularly elected during that time period

as well.[1] In 1972, partisan political primaries were eliminated for judicial elections, but contested popular elections were retained. In 1976, Florida amended its constitution to provide for appointment of Florida appellate and Supreme Court judges, with periodic retention elections. Elections for trial court judges were retained in 1976, however, and have survived a number of efforts by the Florida Bar to convince the legislature to abolish such elections and institute an appointment system. *See generally* Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla. L. Rev. 529, 539-40 & n. 101 (1991) ("Judicial Selection Methods in Florida").

Florida law currently permits judges elected in one district to sit by assignment in another district; for example, county judges may sit as circuit judges within their circuits, even though many of the circuits are composed of several counties and the county judges are elected only by voters within the county. Fla. Stat. § 26.57. Judges are also permitted to preside over cases in which the attorney for one litigant, but not the other, has made campaign contributions to the judge. *MacKenzie v. Super Kids Bargain Store*, 565 So. 2d 1332 (Fla. 1990). Lawyers are estimated to make approximately 80% of the contributions to judicial campaigns in Florida. *Judicial*

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[1] From 1913 until 1942, circuit judges in Florida were appointed by the Governor after nomination in party primary elections, but in 1942 gubernatorial appointment was replaced by direct popular elections of circuit judges. Def. Ex. 3 at 59-60. During approximately the same period, the selection of lower level trial court judges, including county judges, went back and forth between appointment and direct popular election, but since 1966 county judges have been subject to popular election. *Id.* at 70-72.

Selection Methods in Florida, at 556.

As the District Court found, Florida has a long history of racial discrimination in elections and in other walks of life, including legal education, and black citizens continue to suffer from this history, particularly in terms of pronounced socioeconomic disparities. App. at 26a-27a, 18-20c.

The at-large judicial elections for the Fourth Circuit and the Duval County Court are characterized by a majority vote requirement, a numbered-place system, and the use of staggered terms. The election districts are very large -- the Fourth Circuit covers approximately 2,017 square miles and contains a 1990 census population of 822,898. Duval County covers approximately 776 square miles and contains a 1990 census population of 672,971. App. at 12c. In order to qualify to run for a judgeship, a candidate must pay a filing fee of approximately $4,400 for county court and $5,000 for circuit court, although a candidate can avoid the fee by a petition process with a number of signatures from registered voters. App. at 12c-13c.

The evidence at trial included the two recent reports of the Florida Supreme Court Racial and Ethnic Bias Study Commission, which concluded that the underrepresentation of minorities on the bench in Florida is a serious problem that undermines the proper administration of justice in the state court system. As stated in the initial report, "the current election process, which provides for circuit-wide, at-large elections, is not yielding sufficient representation of minorities on Florida's bench." Pl. Ex. 7 at 16-17; App. at 27a. The subsequent report noted that the underrepresentation of minorities in the Florida judiciary "perpetuate[s] a system which is . . . unfair and insensitive to individuals of color. . . . [and]

weakens the very system of ordered liberty upon which our democracy is based." Pl. Ex. 15 at vii-viii; App. at 28a. Among the remedies the Commission recommended for consideration was the use of judicial election subdistricts. Pl. Ex. 7 at xii, App. at 28a.

In order to demonstrate that black voters would be able to elect candidates of choice in the absence of the challenged electoral configuration, *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 and n. 17 (1986), the plaintiffs presented evidence -- and the District Court found -- that a geographically compact election district easily could be drawn in the northwest quadrant of Duval County with a 60% black voting age majority. It would be of sufficient size to elect six of the 28 circuit court judges and three of the twelve county court judges. The district would contain a population of 173,967, which is larger than that of the existing Third Judicial Circuit in Florida (located in North Florida near the Fourth) or the existing Sixteenth Judicial Circuit, and larger than most of Florida's county courts. App. at 103a-104a, 108a, 13c, 27c-28c; Pl. Ex. 4A, 5, 8-9. Use of such a district would permit some judges to be elected from a majority black election district and some from a majority white district, rather than the current configuration in which all are elected from a majority white district.

Of course, subdistrict elections are not the only remedial option. Indeed, whenever a voting rights violation is found, the state has the first option of adopting a remedy, and it has great flexibility in doing so, as long as the remedy cures the violation. *See McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981). In their complaint, the plaintiffs did not confine themselves to seeking only one particular remedy such as subdistricts, but instead broadly requested relief that would redress the dilution caused by the existing districts. Complaint,

¶27(c). The District Court, concluding that plaintiff's evidence regarding a potential majority black district adequately addressed what is known as the first factor of the *Thornburg v. Gingles* threshold test, precluded plaintiffs from presenting evidence regarding other potential remedies, instead holding that such evidence should await the remedy phase of the case if a violation were found. App. at 46c; *see* Tr. Vol. 5 at 81.[2]

Despite the evidence demonstrating the inability of black voters to elect candidates of choice in the election districts under challenge, the District Court denied the Section 2 claim. Although the court concluded that that voting patterns in the election contests between black and white candidates "would ordinarily make out a sufficient showing of racial polarization," App. at 29c, it found

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[2] The state could consider a number of remedial options. Subdistricts, which generally involve the division of an at-large election district into subdistricts for election purposes, with judges continuing to hear cases arising throughout the original district, are only one option. If a majority black election district were created along with one or more majority white districts, the State could make its own decisions regarding jurisdiction and case assignment. Judges elected from the newer and smaller districts could continue to hear cases arising from the original district, or they could hear only cases arising from their election districts. (Florida law currently allows county court judges elected from only one county within the various multi-county circuits to sit by assignment as circuit judges hearing cases arising from throughout the circuit. Fla. Stat. § 26.57). If the state wanted judges to be electorally accountable to the voters of the original district, it could hold competitive elections from subdistricts followed by retention elections in the original district, either in conjunction with the initial election or at the mid-term point. Other options include modified at-large systems such as limited or cumulative voting, or the elimination of the majority vote requirement or other dilutive features, if that is sufficient to cure the violation.

against the plaintiffs on the issue of racial polarization for a variety of reasons. *Id.* at 39c-35c.[3] The District Court also ruled that even if polarized voting had been established, the defendants should nevertheless prevail because, in the District Court's words, "the voting community is not driven by racial bias." App. at 36c.

On appeal, a panel of the Eleventh Circuit reversed and ordered that judgment be entered for the plaintiffs. 1 F.3d 1171 (11th Cir. 1993). The panel held that the District Court's reasons for rejecting the clear evidence of polarization conflicted with this Court's decision in *Gingles*. App. at 14b-21b. The panel also held that it need not decide whether plaintiffs were required to prove racial bias in "the voting community," because even if that were a requirement under Section 2, the plaintiffs had met it. As the panel noted, the evidence demonstrated the presence of bias among the voting community because black candidates for judgeships in the jurisdiction always lost to white candidates as the result of polarized voting, regardless of candidate qualifications or any other factor. *Id.* at 21b-26b.

The Eleventh Circuit granted rehearing en banc, and upon review, by a 6-2 vote, rejected the panel decision and affirmed the District Court's ruling against the plaintiffs, although on completely different grounds than those employed by the District Court. Chief Judge Tjoflat wrote an opinion that was joined in its entirety by Judge Anderson and in parts III(A) and III(B)(1) by four other judges. Judge Edmondson, writing for four of the six judges in the majority, wrote a short opinion explaining

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[3] These reasons were later rejected by all of the Eleventh Circuit judges who addressed the issue. 39 F.3d at 1537-41 (opinion of Tjoflat, C.J., joined by Anderson, J.); App. at 14b-21b (panel opinion joined by Hatchett and Kravitch, JJ).

his own reasons for rejecting the plaintiff's Section 2 claim, as well as his joinder in parts III(A) and III(B)(1) of Chief Judge Tjoflat's opinion.[4] He also stated that he concurred in the conclusion contained in Part V of Chief Judge Tjoflat's opinion, adding that while he did not necessarily disagree with the remainder of Chief Judge Tjoflat's opinion, he saw no reason to reach the issues encompassed by it. He was joined by Judges Birch, Cox, and Dubina. Judge Hatchett wrote a dissenting opinion, joined by Judge Kravitch.

The six judges in the majority held that the State's alleged interest in retaining the at-large election structure (with numbered posts and a majority-vote requirement) outweighs, as a matter of law, the vote dilution that stems from black voters being submerged in these majority white districts and precludes any relief under Section 2. Chief Judge Tjoflat's opinion for himself and Judge Anderson analyzed the evidence of racial polarization and vote dilution coming from these election districts. Although he adopted an extraordinarily high burden for plaintiffs in Section 2 cases -- requiring that plaintiffs demonstrate "that a voting community is driven by racial bias," App. at 63a -- part IV of his opinion concluded that the evidence in this case meets that standard and racial bias consistently prevents black voters from electing candidates of choice in the challenged districts. App. at 99-102a. However, Chief Judge Tjoflat held in part V of his opinion that plaintiffs could not prevail because of the weight of

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[4] Three of the Eleventh Circuit judges -- Judges Black, Carnes, and Barkett -- recused themselves and did not participate. One of the judges on the orginal panel was Judge Clyde Atkins of the Southern District of Florida, who was sitting by designation, and, accordingly, he did not participate in the en banc rehearing.

the state's interest in maintaining the existing at-large election districts. Using reasoning that would not be limited to Florida, but would apply to any state electing trial judges in at-large elections, Chief Judge Tjoflat concluded in Part V that any remedy "would have the effect of undermining the [state] court's ability to administer justice." *Id.* at 112a.. This followed the earlier pronouncement in Parts III(A) and III(B)(1) of his opinion, which were joined by all six judges in the majority, in which Chief Judge Tjoflat said plaintiffs cannot prevail unless there is "a remedy within the confines of the state's judicial model that does not undermine the administration of justice." App. at 77a.[5]

In his opinion for four of the six judges in the majority, Judge Edmondson described their reasons for rejecting the Section 2 claim:

> The State of Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, *as a matter of law*, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here.

App. at 113a. (emphasis added). Indeed, Judge Edmondson and the other three judges who joined his opinion specifically declined to evaluate or weigh the

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[5] Chief Judge Tjoflat's opinion includes a lengthy section which offers a description of Florida's current election system (Part I of opinion, App. at 7a-20a). However, as the opinion acknowledges, that discussion is premised in part on sources of information not presented to or considered by the district court, App. at 6a and the four concurring judges did not join in this portion of Chief Judge Tjoflat's opinion.

evidence of vote dilution and racial polarization, and declined to join the portions of Chief Judge Tjoflat's opinion analyzing the evidence of vote dilution in these districts. Instead, Judge Edmondson said:

> I do not say that the rest of the Chief Judge's opinion is wrong. But, I believe the conclusions reached in the other parts are *unessential to deciding this case*; and to decide nothing about what seem to be unnecessary issues seems best.

Id. (emphasis added). Judge Edmondson also suggested that the state's right to formulate its own judicial system would preclude any potential voting rights remedy:

> I understand Part V of the Chief Judge's opinion to conclude that each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system. I concur in this conclusion, which I see as the holding of this case. But I cannot agree (and I doubt the Chief Judge means to say) that a remedy must undermine the administration of justice in the state courts before that remedy would fall beyond the power of the federal courts to impose under the Voting Rights Act.

Id.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S HOLDING IN *HOUSTON LAWYERS' ASSOCIATION V. ATTORNEY GEN. OF TEXAS*, 501 U.S. 419 (1991).

In *Houston Lawyers' Association v. Attorney Gen. of Texas*, 501 U.S. 419 (1991) ("*Houston Lawyers*"), this Court squarely held that the "results" test of Section 2 of the Voting Rights Act applies to claims challenging judicial elections, and that a state's interest in maintaining a particular judicial election scheme does not exempt the scheme from scrutiny to determine if it unlawfully dilutes minority voting strength. 501 U.S. at 428. Under the holding in *Houston Lawyers*, when states choose to employ popular elections for their trial court judges, those elections are subject to the anti-dilution strictures of Section 2. As this Court stated: "[b]ecause the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the 'totality of circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution." 501 U.S. at 427.

In the Eleventh Circuit, however, a different rule now prevails. In the Eleventh Circuit, regardless of the severity of racial discrimination in at-large judicial elections, that discrimination is beyond the reach of Section 2 of the Voting Rights Act, because the state's prerogative of structuring its judicial election system as it sees fit precludes any remedy as a matter of law.

Chief Judge Tjoflat, joined by Judge Anderson, expressly found that plaintiffs had proved dilution of their voting strength and had demonstrated that the voting community in the North Florida jurisdiction at issue is

actually "driven by racial bias" in its voting patterns. App. at 63a, 99-102a. Chief Judge Tjoflat's opinion nevertheless holds that no relief is available under the Voting Rights Act, regardless of the dilution of black voting strength, because any alteration of this discriminatory system would "undermin[e] the [state] court's ability to administer justice". App. at 112a. Four other judges stated that they saw no need to reach issues such as the extent of racially polarized voting or whether plaintiffs proved vote dilution, because "Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, *as a matter of law*, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here." App. at 113a (Edmondson, J., joined by Cox, Birch, and Dubina, JJ., concurring in part and concurring in the result) (emphasis added). Judge Edmondson's opinion concluded that "each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system." *Id.*[6]

In short, for the Eleventh Circuit, state interests establish an absolute bar which restrict the reach of the Voting Rights Act and preclude any remedy, regardless of any other fact. Indeed, although Chief Judge Tjoflat's opinion extensively discussed the plaintiffs' evidence of

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[6] Indeed, these four judges apparently advocated a view requiring even more deference to state interests than that advocated by Chief Judge Tjoflat and Judge Anderson. The concurring opinion states: "I cannot agree (and I doubt the Chief Judge means to say) that a remedy must undermine the administration of justice in the state courts before that remedy would fall beyond the power of the federal courts to impose under the Voting Rights Act", *id.* (Edmondson, J., concurring in part and concurring in the result).

vote dilution, that evidence *played absolutely no role* when Chief Judge Tjoflat addressed (in Part V of his opinion) the issue which he deemed dispositive: the effect of a possible remedy on the state's interests. In any event, four members of the six-member majority explicitly held that evaluation of other issues such as vote dilution is "unessential to deciding this case." *Id.*

Such a rule cannot possibly be squared with *Houston Lawyers'* holding that state interests are merely "one factor" to be considered under the totality of circumstances, rather than a basis for exempting judicial elections from the coverage of the Voting Rights Act. 501 U.S. at 428. It conflicts with that holding for the Eleventh Circuit to embrace a rule forbidding all remedies in a judicial election case as a matter of law, without regard to the severity of the racial discrimination caused by the current system.[7] In determining whether a remedy for vote dilution was permissible under the Voting Rights Act, the Eleventh Circuit gave no weight to the strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination in the election

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[7] The impact of the Eleventh Circuit's rule is stark. In 1992, a district court ruled that at-large judicial elections in the Second Judicial Circuit and the Leon County Court (also in North Florida) unlawfully diluted black voting strength under Section 2. *Davis v. Chiles*, No. 90-40098-MP (N.D. Fla. Sept. 3, 1992). Indeed, in that case, the district court found that no black judge had *ever* sat on the circuit or county court, and no black candidate had won a contested countywide or circuitwide election for *any* office, let alone judicial office, since 1976, even though the circuit is nearly 30% black in population. No remedial proceedings have ever been held in *Davis*, however, because of the pendency of appellate proceedings in *Nipper*, and it appears that no relief for the Section 2 violation can ever be awarded if the *Nipper* ruling stands. *Davis* remains on hold pending the disposition of this petition for certiorari.

process. Consistent with the Supremacy Clause, Congress has the power to pass legislation that remedies racial discrimination, even when state interests are affected. Using its broad powers under the Fourteenth and Fifteenth Amendments, Congress enacted the Voting Rights Act in 1965 to "rid the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 365 (1966), and strengthened the Act in 1982 to outlaw election practices that result in racial discrimination, even if the result is unintentional. One of Congress' primary concerns in 1982 was the potential for racial vote dilution through the use of at-large, multimember election districts in which a politically cohesive, geographically compact minority population may find its voting strength submerged, year after year, by white bloc voting.[8]

Thus, it would be contrary to Congress' intent to permit the continuation of a racially discriminatory election system simply because the state can assert an interest in the challenged scheme. As the Senate Report accompanying the 1982 amendment of Section 2 stated concerning state interests:

> [e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. Rep. No. 97-417, 97th Cong., 2d Sess. at 29 n.117,

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[8] *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993) ("multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts"); *Thornburg v. Gingles*, 478 U.S. at 47, 48.

reprinted in U.S.Code, Cong. & Admin. News 177, 207.[9]

Chief Judge Tjoflat and Judge Edmondson relied heavily upon the state's purported interest in "linking" the electoral base and the area of case assignment, believing that this should preclude as a matter of law any remedy in which judges would be elected from a subdistrict of the circuit or county.[10] Of course, when state election schemes are found to violate federal law, this Court's precedents hold that the state has the first option of formulating a remedy, and it has great flexibility in doing so, as long as the violation is cured. *McDaniel v. Sanchez*, 452 U.S. at

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[9] At the congressional hearings on the amendment of Section 2 which was adopted in 1982, numerous witnesses testified about discrimination in judicial elections (among other elections), presented examples of how vote dilution hampered the election of minority judges as well as other officials, articulated the need for better minority representation on the bench, and cited polarized voting patterns in elections for judges as well as for other offices. *See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act*, 97th Cong., 2d Sess. (1982), 306 n.33, 669, 748; *Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) 234 260, 516-28, 550, 571, 574, 825, 930, 940-42, 949, 1010, 1188, 1243, 1745, 2647-48. *See generally* Brief for the Lawyers' Committee for Civil Rights Under Law, *et al.*, as *Amici Curiae* in Support of Petitioners, in *Chisom v. Roemer* and consolidated cases, Nos. 90-757, 90-1032, 90-813, & 90-974, at 14-19 (discussing testimony at congressional hearings).

[10] The opinions referred to linkage between electoral base and "jurisdiction." At present, however, Florida judges have "jurisdiction" -- in terms of judicial authority -- outside their current election districts, because they can be assigned to hear cases arising from other districts.

150 n.30. The plaintiffs here did not limit the request for relief in their complaint, or in the course of this litigation, to any particular remedy such as subdistricts, but instead have broadly requested a remedy that will avoid dilution of their voting strength. Complaint, ¶ 27(c). Thus, the question of whether to preserve any state interest in "linkage" is a question for the state to answer in formulating a proposed remedy. Remedies are fully available by which the state could preserve this linkage, including (but not limited to): creating a new district in which judges will generally hear cases arising from within that district; employing modified at-large systems such as cumulative or limited voting[11]; or holding an initial election from subdistricts, followed by a later retention election in which all of the voters of the jurisdiction would vote to approve or disapprove the winner of the subdistrict election.

Even if the desirability of subdistricts were the controlling issue, the State produced no evidence at trial that "linkage" of electoral base and jurisdiction constitutes a strong -- much less a compelling -- state interest in Florida.[12] Two incumbent white judges testified as to their personal belief that creation of a subdistrict would be

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[11] *See* Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 Yale L. & Policy Rev. 354 (1991) (explaining operation of modified at-large election systems).

[12] As to subdistricts -- the only potential remedy addressed by the district court -- the district court held only that the State had a "legitimate" interest in its current at-large scheme. App. at 46c. The district court did not find that the use of subdistricts would "undermine the administration of justice" in Florida or even that the State had a *compelling* state interest in "linkage."

undesirable because judges might feel pressure to favor litigants from their own subdistrict. Tr. Vol. 3 at 130, 190. But witnesses for both the State and the plaintiffs acknowledged that under Florida's current system judges regularly hear cases in which one litigant but not the other resides in the judge's jurisdiction, and do so fairly and impartially. Tr. Vol. 3 at 198-99; Vol. 5 at 7. Furthermore, Florida law permits judges elected from a subunit of a circuit -- county court judges -- to sit by assignment as circuit judges, even though circuits usually encompass more than one county. Fla. Stat. § 26.57. Thus, Florida has no state interest in "linkage" so overwhelming that it overrides contrary federal policy expressed in the Voting Rights Act. *Cf. Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (more is required than "the mere incantation of a proper state purpose" to uphold state action which infringes important rights).[13]

Indeed, *all* states which use at-large judicial elections could claim this type of generalized interest in maintaining "linkage." If that is sufficient to remove a state's judicial elections from the reach of Section 2, then this Court's decision in *Houston Lawyers* would be meaningless: all states that have discriminatory at-large

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[13] Indeed, Florida currently tolerates practices that are much more likely to call into question a judge's independence than the creation of subdistricts -- namely, campaign contributions to judges by lawyers who then appear before the judge on behalf of a litigant. *See MacKenzie v. Super Kids Bargain Store*, 565 So. 2d at 1334-38; Tr. Vol. 3, at 127, 135. As *MacKenzie* reasoned, "As with other elections, judicial elections involve campaigns. As with other campaigns, judicial campaigns require funds". *Id.* at 1335. A litigant, even when he resides in the judge's election district, has at most one vote to provide, while financial contributions from lawyers are potentially much more important in the election context.

judicial elections would be able to escape Section 2's strictures merely by pointing to their interest in "linkage."

Chief Judge Tjoflat's opinion also relies on speculation that subdistricts *might* impair state interests by discouraging white attorneys from standing for office in majority-black districts, and vice-versa. App. at 107a. This simply ignores his own earlier finding that black attorneys *are currently discouraged from running for any position on the court* because of pervasive white bloc voting. App. at 92a-93a.

In contrast to this speculation, the plaintiffs presented undisputed evidence that subdistrict elections *actually in use* in other states are working well. Judge Robert Gibbs, a judge elected under a subdistrict plan in Mississippi, and attorney Spencer Gilbert, who practices business and commercial litigation in that jurisdiction, both testified that the subdistricting system is not at all harmful to the administration of justice, and indeed has improved the administration of justice because of the enhanced perception of fairness stemming from a racially integrated bench.[14] Both witnesses confirmed that judges

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[14] Mississippi has used subdistrict elections in eight judicial districts since 1988, when the district court found that at-large elections violated Section 2. *Martin v. Mabus*, 700 F. Supp. 327, 349 (S.D. Miss. 1988). Other states also use subdistricts for all or some of their judicial elections. In 1987, North Carolina adopted a system providing for nomination from subdistricts, with statewide general elections, for trial judges. N.C. Stat. Ann. § 7A-41 (West 1992). In Louisiana, the district court adopted subdistricts as a remedy in *Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991), *appeal dismissed sub nom. Clark v. Edwards*, 958 F.2d 614 (5th Cir. 1992). In Illinois, subdistrict elections were adopted for the election of Cook County trial judges in 1991. 705 Ill. Comp. Stat. Ann. § 50/2 (West 1992). Section 2 lawsuits have also resulted in consent

generally are not even aware of the litigants' addresses, and that a judge perceived as biased against litigants outside his subdistrict would find it difficult to obtain campaign support from the bar, since lawyers continue to practice before all the judges and to play a major role in elections. Tr. Vol. 5 at 24-30, 47-51.

Moreover, as the Eleventh Circuit acknowledged, the district court in this case never addressed the efficacy of any possible remedies other than subdistricts, holding that "proposed remedies are relevant only if a violation is proved." App. at 46c; *see* App. at 103a (acknowledging that district court "did not undertake this inquiry"). Indeed, the district court expressly declined to hear plaintiffs' evidence on possible alternatives to subdistricts. Tr. Vol. 5 at 81. Chief Judge Tjoflat's rejection of all such alternative remedies as a matter of law is thus based merely on unsupported speculation as to their possible consequences.

For example, Chief Judge Tjoflat rejected out of hand the state's option of creating new election districts in which the judges would primarily hear cases arising from those districts, as they do now -- even though this would preserve "linkage". His reasons were that this "would require a modification of Florida's venue rules," would "alter the composition of the courts' jury pools," and would create "a system of separate justice" with "black jurisdictions and white jurisdictions" under which "[c]ases brought by blacks against blacks or by whites against whites could be transferred to the black or white courts, respectively." App. at 108-109a. Of course, the question

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decrees establishing subdistrict elections in Tulsa, Oklahoma, *Robinson v. State*, No. 91-C-468-B (N.D. Okla., order of June 10, 1993), and in Arkansas, *Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark., order of Nov. 7, 1991).

of what to do about venue rules and jury selection would be up to the state.[15] As for Chief Judge Tjoflat's statement that this would create a "system of separate justice," the assertion is wrong. The mere fact that some judges might be elected from a majority black district while others are elected from a majority white district does not create "black jurisdictions and white jurisdictions" in which cases would be transferred based upon the race of the litigants, and no one has ever suggested such a result. If the *current* 80% white district is not deemed a "white court" which constitutes a "system of separate justice," there is no basis to say that such a separate system would be created simply because some judges would be elected from a majority black district.

Chief Judge Tjoflat also rejected, as a matter of law, the state's option of using a modified at-large system such as cumulative voting, arguing that this option might increase the frequency of contested judicial elections, which he believed detrimental to "the independence of the judiciary." App. at 109a-110a . But the State itself has decided to retain popular elections for trial court judges; a possible increase in the frequency of elections that are fully authorized by the state's constitution and laws is not the type of injury to state interests that could block enforcement of the Voting Rights Act.[16] His opinion also

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[15] Assuming the state wished to preserve "linkage," it could provide, as it does now, that cases arising in and properly filed in a district would generally be heard by judges elected from that district. The state could determine whether or not jury pools would be chosen exclusively from within the particular district or from a larger area.

[16] Florida, like the state of Louisiana in *Chisom v. Roemer*, (the companion case to *Houston Lawyers*), "has decided to elect its judges and to compel judicial candidates to vie for popular

asserted that this option would allegedly "have a detrimental effect on the collegiality of the court's judges in administrative matters" by potentially requiring incumbent judges to compete for unnumbered seats. App. at 110a. An earlier part of the opinion, however, asserted that trial judges, unlike appellate judges, do *not* act as a "collegial" court. App. at 103a-105a. Finally, Chief Judge Tjoflat said that this option would "encourage racial bloc voting." Of course, Chief Judge Tjoflat already noted that judicial elections in these districts are saturated with racial bloc voting. The entire purpose of a Section 2 remedy is to allow minority voters to elect candidates of choice even in the context of such voting patterns. Absolutely no evidence was offered to demonstrate that the remedy would somehow *increase* racial bloc voting. Moreover, Chief Judge Tjoflat gave no consideration at all to some remedial options that would preserve "linkage", such as competitive subdistrict elections followed by districtwide retention elections.

This is not to say that any one remedy must be deemed the "preferred" remedy. That choice will be up to the State in the first instance if a Section 2 violation is found. All systems of selection of judges -- or any public officials, for that matter -- have their positive and negative qualities. The point here is that the Voting Rights Act applies when an election system precludes black voters from electing candidates of choice. *Houston Lawyers* instructs that states which choose to elect their judges

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support just as other political candidates do", 501 U.S. 380, 400 (1991); *see also Houston Lawyers*, 501 U.S. at 426. As the Florida Supreme Court noted in 1990: "the citizens of Florida have chosen to retain the power to elect county and circuit judges." *MacKenzie v. Super Kids Bargain Store*, 565 So.2d at 1335.

cannot then claim a state-interest exemption from the requirements of Section 2. The Eleventh Circuit's ruling, by concluding that state interests preclude any remedy as a matter of law, without regard to the severity of racial vote dilution caused by the election system, contravenes this Court's ruling in *Houston Lawyers* and renders Section 2 inapplicable to elections for state court trial judges.

II. THE ELEVENTH CIRCUIT'S DECISION ERRONEOUSLY EXTENDS THE "BENCHMARK" THEORY OF *HOLDER V. HALL*, 114 S.CT. 2581 (1994), TO PRECLUDE A SECTION 2 REMEDY IN A CASE CHALLENGING AT-LARGE, MULTIMEMBER DISTRICT ELECTIONS.

The Eleventh Circuit majority erroneously believed that *Holder v. Hall*, 114 S.Ct. 2581 (1994), required a finding that Florida's interests preclude any remedy here. Quoting language from Justice Kennedy's opinion in *Holder v. Hall*, Chief Judge Tjoflat stated that "'where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.'" App. at 81a-82a, quoting *Holder*, 114 S.Ct. at 2586 (opinion of Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J). Chief Judge Tjoflat, in a portion of his opinion joined by the five other members of the majority, expanded that reasoning to reach a much broader conclusion that any remedy must come from within the confines of the state's existing judicial system. App. at 81a (Part III(B)(1) of opinion). Then, in Part V of his opinion, Chief Judge Tjoflat concluded that no such remedy is available, App. at 103a-112a. Judge Edmondson's opinion for four judges also concluded that the state's "right to formulate its own

judicial system" precluded any remedy. *Id.* at App. at 113a.

Such a reading of *Holder v. Hall* is insupportable and would expand the reach of that holding far beyond the narrow limits carefully set forth in that case. In *Holder*, this Court addressed the unique circumstances of a vote dilution claim through which minority voters sought to increase the size of the elected body. Although not agreeing on the precise rationale, three members of the Court in *Holder* held that no vote dilution claim could be maintained because federal courts did not have a workable means of determining how many members a governing body should contain for purposes of measuring vote dilution.

Contrary to the Eleventh Circuit's reasoning, this holding in no way serves to bar a Section 2 vote dilution challenge to a multimember system such as that at issue here, given that plaintiffs do not seek any change in the number of officeholders. As Justice O'Connor noted in *Holder*:

> This case presents the question whether, in a § 2 dilution challenge **to size**, there can ever be an objective alternative benchmark for comparison. And I agree with Justice KENNEDY that there cannot be. **As Justice KENNEDY points out, *ante*, at 2585, the alternative benchmark is often self-evident. In a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts. . . .** Though there may be disagreements about the precise appropriate alternative practice in these cases, there are

> at least some objectively determinable constraints on the dilution inquiry.

114 S.Ct. at 2589-90 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted, emphasis added). Thus, this Court deliberately distinguished multimember district cases such as this from the unique situation present in *Holder v. Hall.* Because the Eleventh Circuit's reading of *Holder* would create enormous confusion in the determination of Section 2 lawsuits, review by this Court is warranted for this reason as well.[17]

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH HOLDINGS OF THE FIFTH AND SIXTH CIRCUITS AND A THREE-JUDGE COURT IN THE NORTHERN DISTRICT OF CALIFORNIA.

The Eleventh Circuit stands alone in holding that the state's interest in retaining existing judicial election districts outweighs, as a matter of law, any and all evidence of racial vote dilution, and also in holding that plaintiffs cannot prevail in at-large challenges of this sort because of the purported unavailability of remedies.

By contrast, the Sixth Circuit has held, in a very

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[17]Chief Judge Tjoflat, joined only by Judge Anderson on this point, also held that courts must find that the voting community is "driven by racial bias" before it can rule in favor of Section 2 plaintiffs. App. at 99a-103a. This ruling, however, was not necessary to the Court's decision, because Chief Judge Tjoflat found that plaintiffs' evidence satisfied this condition in any event. *Id.* at 99a-102a. However, if the Court is inclined to address this issue, petitioners respectfully contend, as they did in the Eleventh Circuit, that a showing of racial bias in the voting community is not required and would place too great a burden on Section 2 plaintiffs.

recent decision, that the state's interest does not automatically outweigh evidence of vote dilution:

> The state's interest is only one factor to be considered in evaluating the totality of circumstances. It does not automatically outweigh proof of racial vote dilution.

Cousin v. McWherter, 1995 WL 57301 (6th Cir. Feb. 14, 1995), at *10. Instead, said the Court, the state's interest, though substantial, must be weighed "against evidence bearing on the factors indicative of vote dilution." *Id.* Because the district court decision in *Cousin* had not adequately weighed the state's interest, the Sixth Circuit remanded the case for further findings. In doing so, the Sixth Circuit made it clear that, if the evidence of dilution was sufficiently strong to outweigh the state's interest in retaining the existing district, maintenance of the district would violate Section 2 and relief would be required. *Id.*

Also in contrast to the Eleventh Circuit, the Fifth Circuit, sitting en banc, held that while the state's interest must be considered, "we recognize that it will not always defeat § 2 liability." *LULAC v. Clements*, 999 F.2d 831, 876 (5th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 878 (1994). As the Fifth Circuit noted:

> The State of Texas maintains that the linkage interest must defeat liability in *every* case, regardless of the other circumstances in the totality. The Supreme Court rejected this position when it held that the linkage interest does not "automatically, and in every case, outweigh proof of racial vote dilution." *Houston Lawyers'*, __ U.S. __, 111 S.Ct. at 2381.

999 F.2d at 870 (emphasis in original). Instead, said the

Fifth Circuit, the state's interest "is balanced against localized evidence of racial vote dilution" and "must be weighed in the totality of circumstances." *Id.* at 868. If there is "substantial proof of racial dilution," it outweighs any state interest, according to the Fifth Circuit, and is sufficient to demonstrate a violation of Section 2. *Id.* Although the Fifth Circuit ultimately held that the plaintiffs in that case had not carried their burden under Section 2, it was because the Court concluded the evidence of dilution was non-existent or weak at best, and not because the state's interest automatically controlled as a matter of law.

In another decision that is contrary to the analysis of the Eleventh Circuit, a three-judge federal district court held that a state's interest in retaining at-large election districts is not compelling, and that a remedial subdistricting election system would not undermine the state courts' "ability to administer justice." *Lopez v. Monterey County, California*, 1994 WL 713720 (N.D. Cal. Dec. 20, 1994) (three-judge court), at *5-*7 (granting preliminary injunction requesting judicial subdistricts as interim remedy in Section 5 enforcement action). Indeed, in doing so, the three-judge court specifically considered the contrary holding of the Eleventh Circuit in the present case, but declined to follow its rationale. *Id.* at *6-*7.[18]

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[18] The Eleventh Circuit's holding also conflicts with two federal district court decisions from within the Fifth Circuit finding violations of Section 2 despite the states' invocations of state interests in retaining the existing majority white election districts. *Clark v. Roemer*, 725 F.Supp. 285 (M.D. La. 1988), 777 F.Supp. 471 (M.D. La. 1991); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987), and *Martin v. Mabus*, 700 F.Supp. 327 (S.D. Miss. 1988). In both cases, the federal district court found liability, and when the state legislatures failed to adopt remedies, the courts implemented remedial subdistrict plans.

IV. THIS CASE RAISES UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO AT-LARGE ELECTION DISTRICTS FOR STATE TRIAL JUDGES AND THE ROLE OF STATE INTERESTS IN THAT EVALUATION.

In its 1991 decisions holding that Section 2 applies to elections for state court judges, this Court expressly reserved the question of "the elements that must be proved to establish a violation of the Act" in the context of judicial election districts. *Chisom v. Roemer*, 501 U.S. at 390. As the Court stated:

> The standard that should be applied in litigation under § 2 is not at issue here. Even if serious problems lie ahead in applying the "totality of circumstances" described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

501 U.S. at 403 (footnote omitted).

The Court in *Houston Lawyers* also left unresolved the question of whether the state's interest in maintaining existing at-large election districts for trial court judges is relevant at the liability stage or only at the remedy stage:

> [W]e believe [the state's interests] are matters that are relevant *either* to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2, as amended, *or*

> *to a consideration of possible remedies* in the event a violation is proved, but not to the threshold question of the Act's coverage. *Even if we assume, arguendo,* that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts, or may even preclude a finding that vote dilution has occurred under the "totality of the circumstances" in a particular case, that interest does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test.

Houston Lawyers, 501 U.S. at 426 (emphasis added).

Resolution of these issues will have far reaching implications for voters throughout the country. Additional cases challenging the election of state court judges under Section 2 are pending in Alabama, California, Georgia, Indiana, New York, Tennessee, and Wisconsin[19]; and two

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[19] *See Southern Christian Leadership Conference v. Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992), *appeal pending*, No. 92-6257 (11th Cir. filed Mar. 27, 1992) (challenge to at-large circuit court elections in several Alabama jurisdictions, and to drawing of circuit boundaries in one jurisdiction); *Trujillo v. State of California*, No. C-92-20465 RMW (EAI) (challenge to at-large superior court elections in Monterey County); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994) (challenge to at-large elections for superior court judges in various Georgia jurisdictions); *Del Torro v. Cuomo*, No. 92-7739 (S.D.N.Y.) and *Frances v. Cuomo*, No. 92-1144 (S.D.N.Y.) (challenge to judicial elections in New York); *Bradley v. Indiana St. Election Bd.*, 797 F. Supp. 694 (S.D. Ind. 1992) (challenge to at-large retention elections in Lake County); *Cousin v. McWherter* (challenge to at-large circuit and county court elections in Hamilton County);

additional cases are pending in Florida, including a case in which the plaintiffs won a judgment of liability in 1992.[20] Moreover, the Justice Department has frequently objected to at-large judicial elections under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[21] Because Section 2 and Section 5 are generally to be interpreted in tandem, *Chisom v. Roemer*, 501 U.S. at 401, 402, the Department's enforcement of the Act will also be affected by a resolution of the issues presented here.

Thus, the questions left open in *Houston Lawyers* and *Chisom* are likely to recur frequently and are of considerable importance to the proper enforcement of the Act. Review of the Eleventh Circuit's decision will give this Court the opportunity to clarify the proper means of applying the Section 2 totality-of-circumstances test to at-

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Milwaukee Branch of NAACP v. Thompson, No. 94-C1245 (E.D. Wisc.) (challenge to at-large circuit and appellate court elections in Milwaukee County).

[20] *Davis v. Chiles*, No. 90-40098-MP (N.D. Fla. Sept. 3, 1992) (*see* n. 7, *supra*, for discussion of *Davis*). The other Florida case is *De Yurre v. Chiles*, No. 94-1527 CIV KEHOE (S.D. Fla) (challenge to at-large judicial elections in Dade County).

[21] A number of Section 5 declaratory judgment actions seeking judicial preclearance of various at-large judgeships are pending: *Arizona v. Reno*, No. 94-2054 (D.D.C.) (seeking preclearance of at-large superior court judgeships in Navajo and Coconino counties); *Georgia v. Reno*, No. 90-2065 (D.D.C.), slip op. February 3, 1995 (granting preclearance of 62 at-large superior court judgeships in Georgia); *State of New York v. United States*, No. 94-2219 (D.D.C. Dec. 22, 1994) (granting preclearance of 15 at-large judgeships in New York City), motion to reconsider filed Jan. 9, 1995; *Texas v. United States*, No. 1:94-CV01529 (D.D.C.) (seeking preclearance of at-large judgeships in Harris, Tarrant, Fort Bend and Midland counties).

large trial court election districts, to resolve the question of whether state interests are relevant at the liability stage or only the remedy stage, and to determine the appropriate role of state interests if they are relevant at the liability stage.

Indeed, it is of particular importance that Section 2 cases are pending in all of the states of the Eleventh Circuit -- Alabama, Georgia, and Florida. If not reviewed by this Court, the errors in the Eleventh Circuit's en banc analysis will continue to be replicated in those cases and will, at the very least, render Section 2 a dead letter in that circuit in terms of challenges to at-large election districts for state trial judges.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JESSE L. NIPPER, et al.,

Petitioners,

v.

JIM SMITH, SECRETARY OF STATE, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2588

Jesse L. NIPPER; Donald A. Carter;
Annie Ruth Williams; Selendra Williams;
Katrina Miles; Desi Wayne Dunlap;
Carol D. Days; Anthony Days, and
D.W. Perkins Bar Association,
Plaintiffs-Appellants,

v.

Jim SMITH; Dot Joyce, Director of the Florida Division
of Elections; Tommie R. Bell, Supervisor of
Elections in Duval County; and
Lawton Chiles, Governor,
Defendants-Appellees.

OPINION

December 2, 1994, Decided

**Appeal from the United States District Court
for the Middle District of Florida.
(No. 90-447-CIV-J-16).**

John H. Moore, II, Chief Judge.

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JUDGES:

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH and DUBINA, Circuit Judges.*

OPINION BY: TJOFLAT

OPINION:

TJOFLAT, Chief Judge:

Section 2(a) of the Voting Rights Act, 42 U.S.C. § 1973 (1988), states that "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall

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* Judges Black, Carnes and Barkett recused themselves and did not participate in the consideration or decision of this case.

be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Under section 2(b) of the Act, "[a] violation of [section 2(a)] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of a class of citizens protected by [section 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Section 2 applies to state judicial elections. *Chisom v. Roemer*, 501 U.S. 380, 404, 111 S. Ct. 2354, 2368, 115 L. Ed. 2d 348 (1991); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419, 423-24, 111 S. Ct. 2376, 2379, 115 L. Ed.2d 379 (1991).

In this case, the appellants, black voters and an association of black attorneys, challenge the system used to elect the judges of Florida's Fourth Judicial Circuit Court, which encompasses Duval, Clay, and Nassau counties, and the judges of the Duval County Court. The appellants contend that the use of at-large elections in those trial court jurisdictions dilutes the voting strength of the black minority in violation of section 2; they seek a remedy, such as the creation of subdistricts, that will ensure their ability to elect black judges of their choice. The appellees contend that the appellants are entitled to no relief. First, the appellants and the black voters they represent have suffered no racial vote dilution. Second, assuming that vote dilution exists, the relief the appellants seek would so alter the structure of the Fourth Judicial Circuit and Duval County courts as to undermine the ability of those courts to administer justice.

Following a five-day bench trial, the United States District Court for the Middle District of Florida dismissed

the appellants' case. The court did so on two grounds: (1) the appellants failed to establish an essential element of a vote dilution case—racially polarized voting in the relevant communities—as required by *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25(1986); and (2) the appellees' rebuttal evidence demonstrated that, under "the totality of the circumstances," racial discrimination was not playing a role in the judicial elections under challenge. The district court's finding of no section 2 liability made it unnecessary for the court to consider the matter of remedy.

On appeal, a panel of this court concluded that the evidence before the district court demonstrated racially polarized voting in the Fourth Judicial Circuit and Duval County as a matter of law, and thus a section 2 violation. Without considering, as required by *Houston Lawyers' Ass'n*, 501 U.S. at 426, 111 S. Ct. at 2380-81, the appellees' argument that the relief the appellants sought would undermine the administration of justice in those jurisdictions, the panel remanded the case to the district court for the imposition of a remedy. *Nipper v. Smith*, 1 F.3d 1171, 1184 (11th Cir.1993). The case is now before us on rehearing en banc. *Nipper v. Smith*, 17 F.3d 1352 (11th Cir.1994).

To determine whether the district court erred in holding that the appellants failed to establish a case of vote dilution, we must address a question the Supreme Court has not decided and our divided en banc court in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir.1990) (en banc) (per curiam), *cert. denied*, 498 U.S. 1023, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991), has precluded us from answering: whether section 2 plaintiffs, in order to establish that the challenged electoral scheme is diluting their right to vote "on account of [their] race or color," must demonstrate that their diminished opportunity to participate in the political process and to elect representatives of their choice is being caused by the interaction

of racial bias in the voting community and the challenged scheme. Without an answer to this question, we cannot determine what evidence is relevant, and the weight it should be accorded, in the totality of the circumstances inquiry of section 2(b). Specifically, we cannot determine the weight to be accorded the state policies underlying the challenged judicial electoral scheme. *Houston Lawyers' Ass'n*, 501 U.S. at 426,111 S. Ct. at 2380-81. Nor can we determine, given those policies and the structure of the courts involved, whether the remedy sought is feasible.

In part I of this opinion, we set forth the facts and procedural history of the case. In part II, we address the question left unanswered in Solomon: whether the existence of racial bias in the voting community necessarily forms the basis of a section 2 violation. We hold that the totality of the circumstances must demonstrate that the voting community is driven by racial bias and that the electoral scheme in question permits that bias to dilute the plaintiff minority's voting strength. In part III, after noting several important differences between judicial and legislative elections, we discuss the factors, including the policies advanced by Florida's method of selecting its trial court judges, involved in the totality of the circumstances analysis in judicial election cases. In parts IV and V, we apply the principles set forth in parts II and III to the case at hand. In part IV, we examine the district court's finding of no vote dilution and conclude, as did the panel, that the appellants established a case of dilution. In part V, we consider the matter of remedy. We find that the type of relief the appellants seek would undermine the administration of justice in the trial courts at issue; we therefore affirm the district court's denial of section 2 relief.

I.

Voting rights cases are inherently fact-intensive, particularly those section 2 vote dilution claims alleging

that, due to the operation of a challenged voting scheme, minority voters are denied an equal opportunity to participate in the political process and to elect representatives of their choice. In such cases, courts must conduct a "searching practical evaluation of the 'past and present reality' " of the electoral system's operation. *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764 (quoting S.Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208). Accordingly, because a claim of vote dilution must be evaluated with a functional, rather than a formalistic, view of the political process, the Supreme Court has emphasized the importance of " 'an intensely local appraisal of the design and impact' " of the electoral structure, practice, or procedure at issue. *Id.* at 79, 106 S. Ct. at 2781 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621, 102 S. Ct. 3272, 3278, 73 L. Ed. 2d1012 (1982)). Given the necessity of a nuanced understanding of the election system in evaluating a claim of racial vote dilution, we set out the factual background of this case in some detail.[1]

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[1] A more extensive summary of the district court's factual findings can be found in that court's opinion. *See Nipper v. Chiles*, 795 F. Supp. 1525, 1532-39 (M.D.Fla.1992). The following discussion includes additional material not discussed by the district court of which we take judicial notice. Under Rule 201 of the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Moreover, it is recognized that:

> Appellate courts have a special need to resort to facts not found in the record.When the question before the court is not merely the rights of the parties, but the interests of others who may be affected by the rule the court makes to govern the case, it would be foolish for the court to rely only on the evidence the parties have chosen to prove below.

21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5102, at 462 (1977). Accordingly, we have attempted to develop a more complete picture of judicial elections in the Fourth Circuit and Duval County than that presented to the district court.

A.

Florida's judiciary employs two tiers of trial courts. The circuit courts have general jurisdiction over civil and criminal cases while the jurisdiction of the county courts is restricted to certain statutorily defined classes of misdemeanor and small claims cases.[2] Fla. Const. art. 5, §§ 5-6 (WestSupp.1994); Fla.Stat.Ann. §§ 26.012, 34.01 (West 1988 & Supp.1994). Florida currently has twenty circuit courts (designated by number); they range from single-county circuits (in highly populated areas like Miami or Tampa) to circuits comprised of as many as six or seven counties (many of which are rural). *See* Fla.Stat.Ann. § 26.021 (West 1988). Each circuit judge has jurisdiction or authority within the entire circuit; similarly, the jurisdiction of each judge of the county court extends throughout the county. Although the circuit and county courts have multiple members, like most trial courts they do not operate as collegial bodies; rather, the judges exercise independent judicial authority, engaging in coordinated decision making only for the handling of some administrative matters.

Circuit judges serve six-year terms and county judges serve four-year terms, Fla. Const. art. 5, § 10; in all other respects, the office of judge on the two benches is virtually identical. The judges of the circuit and county courts are elected at-large in nonpartisan circuitwide and countywide elections, respectively; they must reside within the territory of the court on which they serve. The at-large judicial elections for both courts are characterized by a majority vote requirement,[3] a numbered

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[2] Florida also has two levels of appellate courts: the district courts of appeal (intermediate appellate courts) and a supreme court. Fla. Const. art. 5, §§ 3-4 (West Supp.1994). Only the selection of trial court judges is challenged in this case, however.

[3] To be elected to office, a judicial candidate must receive a majority of the votes cast. All candidates for a particular seat first compete in nonpartisan primaries; if no candidate receives an outright majori-

place system (meaning that candidates must run for a particular seat on the court),[4] and the use of staggered terms. In order to qualify to run for a judgeship, a candidate must pay a filing fee (although a candidate can avoid the fee by obtaining a number of signatures from registered voters on a petition), *see* Fla.Stat.Ann. §§ 105.031(3) & .035 (West 1992), and must have been a member in good standing of The Florida Bar for at least five years immediately preceding the election in question, *see* Fla.Const. art. 5, § 8. In the event of a mid-term vacancy on either court, the governor appoints a replacement to serve until the next general election. *Id.* § 11.

In the instant case, the appellants challenge the electoral system for both trial courts in and around Jacksonville, Florida.[5] The Fourth Judicial Circuit is located in northeast Florida and consists of Duval, Clay, and Nassau Counties. Duval County encompasses the City of Jacksonville; the county and city governments were consolidated in 1968. According to the 1990 census, the total population of the Fourth Circuit is 822,928; the black population is 173,937, or approximately twenty-one percent of the total. At the time of trial in 1991, the

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ty, a runoff election is held between the two candidates who received the most votes in the primary.

[4] A numbered place requirement forces candidates for multimember offices (like the courts at issue here) to run for a *particular seat*, rather than for any existing vacancy. Each seat is given a designated place on the ballot (group 1, 2, 3, and so forth) so that all of the candidates are not competing against one another. The effect of a numbered place system is therefore to break what would otherwise be a single contest into several mini-elections. *See* Pamela S.Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv.C.R.-C.L.L.Rev. 173, 186 (1989).

[5] The appellees in this case are the Governor of Florida and the relevant state and county election officials.

Fourth Circuit had twenty-eight circuit judges, only one of whom was black.[6] The total population of Duval County (as of the 1990 census) is 672,971, of which 163,902, or approximately twenty-four percent, are black. Two of the twelve judges on the Duval County Court at the time of trial were black judges.[7]

Although the voting age populations of the Fourth Circuit and Duval County are nineteen and twenty-two percent black, respectively, no black candidate for a judgeship on either court has ever been elected to office in a contested election. Every black judge who has served on one of these courts originally reached office by way of a mid-term appointment to a vacant seat. Although forming a powerful initial sketch of the role played by race in the relevant judicial elections, this bare description of circuit and county court election results paints only part of the total picture. To place the elections at issue in this litigation into their proper context, we first detail the historical evolution of the Florida scheme of judicial elections. We then describe the operation of the current model since its adoption in 1972 and examine the special circumstances and relative infrequency with which black candidates have sought judgeships on the Fourth Circuit and the Duval County Court.

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[6] The only black judge ever to have served on the Fourth Circuit bench at the time of trial was Judge Henry Adams, who testified in this case for the appellants. After the trial was completed but before the district court rendered its decision, a second black judge, Henry E. Davis, was appointed to the court.According to the district court, however, "the Davis appointment has played no part in the Court's consideration of this case." *Nipper*, 795 F. Supp. at 1536 n.10. In late 1993, after the district court issued its opinion, Judge Adams left the circuit court and joined the federal bench as a judge of the United States District Court for the Middle District of Florida.

[7] The two black judges on the Duval County Court are Judges Alfred Washington and James Ruth. Both originally were appointed by the governor to fill vacancies, and both remain on the bench today.

B.

Article 5 of the Florida Constitution, which governs the judicial branch of the state government, has evolved over the last twenty-five years, thereby changing the method of selecting state court judges dramatically.[8] For much of this century, judicial positions in Florida were filled through partisan elections. Florida voters adopted a revised constitution in 1968, but the new version temporarily retained the old system of partisan judicial elections. In 1971, the Florida legislature adopted its first nonpartisan electoral system for the state judiciary. The statute, the contemporary counterpart of which is now codified as Fla.Stat.Ann. § 105.011(2) (West 1992), provided essentially that "[a] judicial office is a nonpartisan office, and a candidate for election or retention thereto is prohibited from campaigning or qualifying for such an office based on party affiliation."[9] At that time, the process of selecting judges became fundamentally different from the methods used to choose other elected state officials.

Article 5 was significantly amended in 1972, although the revised version continued to provide that all judges

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[8] For scholarly treatment of the history of judicial elections in Florida, see Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla.L.Rev. 529(1991); Joseph W. Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 Stetson L.Rev. 1 (1989). The district court was apprised of much of this material because the appellees introduced into evidence a report on this subject from Dr. William Rogers, an historian at Florida State University.

[9] *See also* Fla.Stat.Ann. § 105.041(3) (West 1992) ("No reference to political party affiliation shall appear on any ballot with respect to any nonpartisan judicial office or candidate."); *Id.* § 105.071 (listing limitations on partisan political activities by candidates for judicial office); *Id.* § 105.09(1) ("No political party or partisan political organization shall endorse, support, or assist any candidate in a campaign for election to judicial office.").

would be elected "by vote of the qualified electors within the territorial jurisdiction of their respective courts." When a vacancy occurred on any court of the state, however, the governor would make an interim appointment until a permanent replacement for the remainder of the predecessor judge's term could be elected. Although the ultimate decision regarding such an interim appointment was entrusted to the discretion of the governor, the appointee nonetheless had to be selected from a slate of not fewer than three candidates submitted to the governor by a judicial nominating commission.[10] One commission was created for each court in the state to accept applications from interested eligible attorneys when vacancies arise and to make recommendations thereon. The nominating commission system was designed to inaugurate a merit selection process for members of the state judiciary through the submission of qualified nominees to the governor.

The system of judicial elections currently in place was created by a further amendment to Article 5 that was adopted by the citizens of Florida at the general election in November of 1976. At that time, Florida adopted the "Missouri Plan" [11] for the selection of supreme court justices and the judges of the district courts of appeal, the intermediate appellate courts of the Florida judiciary. Initial selection of those justices and judges was transferred away from the electorate to the nominating commissions and to the governor. The new selection

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[10] Earlier this year, the legislature amended Fla.Stat.Ann. § 26.021 (which, in part, defines the number of judges on the various circuit courts) to provide that "the judicial nominating commission of each circuit, in submitting nominations for any vacancy in a judgeship, and the Governor, in filling any vacancy for a judgeship, shall consider whether the existing judges within the circuit, together with potential nominees or appointees, reflect ... the racial and ethnic diversity of the population within the circuit, and the geographic distribution of the racial and ethnic minority population within the circuit." 1994 Fla.Sess.Law Serv. ch. 94-137, § 1.

process empowers the governor to fill any vacancy (not just an unexpired term) on the supreme court or the district courts of appeal, the only condition being that the selection must be made from a slate of "three persons nominated by the appropriate judicial nominating commission. "Fla. Const. art. 5, § 11(a). These initial appointments are for partial terms of not less than one year, *id.*, at the end of which each justice or judge "may qualify for retention [and a full six-year term] by a vote of the electors." *Id.* § 10(a). The justices and judges of Florida's appellate courts then stand for retention at the end of every term. The retention elections, however, do not involve challenges to the incumbent by another competitor for office; rather, each candidate for retention under this approach runs against his or her established record of performance.

The 1976 constitutional amendments, however, did not alter the method of selecting circuit and county court judges. Therefore, under the present system, which constitutes a partial "Missouri Plan," judges of the circuit and county courts continue to be elected (in nonpartisan elections) to six- and four-year terms, respectively, by vote of the qualified electors in their jurisdictions. *Id.* § 10(b). When a mid-term vacancy occurs, the governor appoints a replacement from a slate provided by the appropriate nominating commission, with a single commission handling nominations for vacancies on a circuit court as well as the county courts in that circuit's territory. *Id.* § 11. As a result, subsequent elections, even at the trial court levels, are affected by the merit

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[11] Missouri adopted its Nonpartisan Court Plan, which provided for merit-based selection of state court judges, in 1940; Missouri's plan has since been emulated for some courts in at least thirty states. For a more detailed discussion of the operation of Missouri's system, see Richard A. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 Sw.L.J. 1 (1986).

selection of interim appointments by the governor upon the recommendation of the judicial nominating commissions; the momentum gained from initial selection by such an independent review panel has a telling effect upon later races in which the incumbent is a candidate. Under the current system of electing trial court judges in Florida, therefore, merit selection plays a part in all but a few: those to fill vacancies on the circuit or county court benches that occur at the end of a term—when, for example, a judge retires and two challengers compete to fill his or her seat.

These changes in Florida's constitution were clearly designed to eliminate the vices of partisan, electoral politics from the process of selecting state court judges. The goal of merit selection of judges, naturally, is to insulate them from popular pressure and to make them more willing to decide an unpopular case fairly and impartially while, at the same time, raising the level of qualifications of judicial officers.

C.

A total of five black candidates have run for seats on either the Fourth Circuit or the Duval County Court in six elections since 1972. We now highlight the circumstances surrounding each of those electoral races while describing the methods by which the judges on those courts have generally reached office during the same period.

The first of the elections relied on by the parties in litigating this case predates the inauguration of Florida's partial merit selection system for trial court judges. In 1972, Leander Shaw became the first black candidate for a judgeship on a court at issue in this litigation. A black lawyer who now serves as a justice of the Florida Supreme Court, Shaw ran for a vacant seat on the Fourth Circuit bench. In the nonpartisan primary, he was opposed by two white candidates, John S. Cox and

George L. Proctor. Shaw and Cox advanced to a runoff election, which Cox ultimately won. The Shaw election was one of only four Fourth Circuit electoral races that were contested during the 1972 election cycle; the other fifteen Fourth Circuit judgeships at stake in that year's elections were filled by candidates who ran unopposed.

The parties in this case introduced a wealth of statistical evidence that indicates how Florida's scheme of trial court elections has operated in the Jacksonville area under the current model. A pattern readily emerges that has prevailed throughout the period at issue in this case: relatively few judicial elections have been contested in the Fourth Circuit and in Duval County.[12] Between January 1, 1973, when the current system for selecting circuit and county court judges went into effect, and the end of 1990, the last year for which information was available at the time of trial, the record reflects that seventy-eight circuit judgeships were filled by election.[13] Of those positions, only ten (or approximately thirteen percent) were contested; the rest were filled by candi-

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[12] Recognizing how often elections for judicial officers are not contested in Florida generally, the legislature has provided that "the name of an unopposed candidate for the office of circuit judge or county court judge shall not appear on any ballot, and such candidate shall be deemed to have voted for himself at the general election." Fla.Stat.Ann. § 105.051(1)(a) (West 1992).

[13] The record does not reflect how many of these races involved an incumbent seeking reelection. Obviously, that information would be important in fleshing out the operation of the judicial election system in the Fourth Circuit and in Duval County.

dates who ran unopposed.[14] Only one black candidate ran for a seat on the Fourth Circuit bench during this period: Harrell T. Buggs in 1978. In the primary, Buggs and two white candidates challenged an incumbent white judge, Lawrence D. Fay, who had been appointed to the court through the merit selection process approximately one hundred days before the election. Fay and one of the white challengers, John E. Palmer, advanced to the runoff; Buggs, who had obtained over eighty percent of the black vote but only approximately four percent of the white vote, was eliminated in the primary.

Focusing solely on the elections described above, however, paints an incomplete picture of how judges come to the circuit court bench in the Fourth Circuit. According to the Duval County Clerk's Office, a total of fifty-four judges have served on the Fourth Circuit since 1972. Fourteen were hold overs from the pre-reform system (six of whom were appointed by the governor before the merit selection process was instituted and eight of whom were elected). With respect to the remainder, twenty-eight circuit court judges began their judgeships after being appointed through the commission

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[14] The following information on the number of contested races for Fourth Circuit judgeships was provided to the district court by Dr. Ronald Weber, an expert witness for the appellees.

Year	# of Seats Up	# Contested	% Contested
1974	4	1	25.0%
1976	2	1	50.0%
1978	17	2	11.8%
1980	5	1	20.0%
1982	3	1	33.3%
1984	16	2	12.5%
1986	7	0	0.0%
1988	9	1	11.1%
1990	15	1	6.7%
Total	78	10	12.8%

system although only twelve originally were elected in nonpartisan elections.[15] Furthermore, although it is true that no black candidates have been elected to judicial office in the Fourth Circuit, two black judges have been appointed under the nominating commission system (Judges Adams and Davis, *see supra* note 6).

The increasing reliance on the appointment process for selecting trial court judges is highlighted by an examination of the composition of the current Fourth Circuit Court. Of the twenty-eight judges presently sitting on the court, nineteen were appointed through the commission process, eight initially were elected in nonpartisan elections, and one was appointed by the governor in 1967 under the old system.[16] Moreover, at the time of trial, only one of the judges then serving on the Fourth Circuit bench had ever been opposed for reelection (Judge Fay by Harrell Buggs in 1978), although the twenty-eight judges collectively had stood for reelection over twenty times.

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[15] The method for filling some of these forty positions, however, was dictated by the fact that they corresponded to newly-created judgeships. According to the Duval County Clerk's Office, whether a new seat on the bench is filled by election or appointment depends upon the effective date set by the legislature. If the seat is created in an election year and the effective date is after the election, the seat is filled by election. If, on the other hand, the position is not created in an election year, or if it is created in an election year but with an effective date before the election, the seat is filled through the nominating commission and appointment process.

[16] The district court did make factual findings concerning the routes by which the twenty-eight judges on the circuit court at the time of trial in 1991 came to the bench: seventeen originally were appointed while eleven initially were elected to office; of those eleven, five ran unopposed. *Nipper*, 795 F.Supp. at 1538 & n. 14. Therefore, only six of the twenty-eight circuit judges serving at the time of trial had earned their place on the bench in a contested election.

A similar pattern emerges from an examination of the county court selection process. From 1973 to 1990, fifty-six judgeships on the Duval County Court were decided by election; only twelve (or approximately twenty-one percent) of those electoral races were contested.[17] Black candidates participated in primaries for three of those elections and were defeated each time. As the district court noted, however, special circumstances surrounded two of these three races. Alfred Washington, a black candidate, lost his primary race for a seat on the Duval County Court in 1978 to Giles P. Lewis, despite garnering eighty-eight percent of the black vote. Prior to the election, however, Washington had resided in the community for only a short period of time whereas Lewis was a longtime resident with an established legal practice.

In 1984, two black candidates sought positions on the county court bench. Denise Prescod was defeated in her primary by incumbent, Edward P. Westberry, even though she garnered a similar proportion of the black vote. Judge Westberry was not a lawyer, but he was permitted to serve on the court under a grandfather clause in the 1972 constitutional revision that allowed former justices of the peace to become county court

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[17] Dr. Weber's report provides the following information concerning contested elections for the Duval County Court:

Year	# of Seats Up	# Contested	% Contested
1974	5	2	40.0%
1976	7	1	14.3%
1978	6	2	33.3%
1980	6	0	0.0%
1982	6	0	0.0%
1984	8	4	50.0%
1986	6	1	16.7%
1988	7	1	14.3%
1990	5	1	20.0%
Total:	56	12	21.4%

judges. He had, by all accounts, received consistently poor ratings from the local bar but was acknowledged to be a vigorous and extremely effective campaigner. Judge Westberry also had been a judicial officer since 1966, thus claiming the mantle of experience. Prescod, a lawyer, received several important endorsements, including those from Jacksonville's only daily newspaper and the public school teachers' organization. At the time she ran for judicial office, however, Prescod had been admitted to The Florida Bar for only two years. Under the current five-year experience requirements, Prescod would not have been eligible to run for county court judge in 1984. The district court concluded that "neither candidate's qualifications ... were particularly helpful to their respective campaigns, and in all probability incumbency ultimately proved to be the deciding factor." *Nipper*, 795 F. Supp. at 1542 n. 18. In the remaining county court election involving a black candidate and the only one in which the black candidate did not challenge an incumbent, Dietra Micks won three-quarters of the black vote but failed to make the runoff for her position against a field of three white candidates.

Again, this time in the county court context, looking solely at elections tells only part of the story. Since 1972, a total of thirty judges have served on the Duval County Court. Ten initially were appointed by the governor under the commission nominating process while twelve originally obtained their positions by winning nonpartisan elections. Nine other county court judges were holdovers from the prior (pre-1972) system. As for the twelve county court judges serving at the time of trial, five were originally appointed to the bench, including both of the black judges.

As the district court concluded, the evidence of black electoral success in the jurisdictions at issue in this case is mixed at best. The court found:

> The black circuit and county judges who have faced reelection have been unopposed and, of course, successful in their reelection bids. In a similar judicial election, Joseph Hatchett's 1976 Supreme Court reelection, the incumbent Hatchett defeated a white candidate. Hatchett garnered a majority of the white vote in both the Fourth Judicial Circuit and Duval County. No black candidate has won a contested election for circuit or county judge at least since 1972.

Id. at 1537.[18] In addition, a review of non-judicial elections in the Jacksonville area reveals a dearth of black electoral success: "No black candidate has won a contested circuit wide [19] or county wide election for any office since 1979," and only one city council member and three members of the civil service board in Jacksonville appear to have done so prior to that time. *Id.*

Black candidates fared better in the Fourth Circuit appointment process. Henry Coxe, the chairman of the Fourth Circuit Judicial Nominating Committee from 1987 to 1991, testified at trial concerning minority participation in the appointment process during his tenure on the committee. Based on that testimony, the district court found:

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[18] Justice Hatchett, now a member of this court, was a United States magistrate in 1975 when Governor Rubin Askew appointed him to be the first black supreme court justice in Florida history. His 1976 reelection campaign, one of Florida's most highly publicized judicial elections, occurred during the few years in which the partial merit selection system applied to supreme court justices. Despite a challenge by Circuit Judge Harvey Duval, a white candidate from Dade County, Justice Hatchett won reelection by garnering a majority of the white vote in both the Fourth Circuit as a whole and Duval County in particular.

[19] There are no non-judicial circuit wide offices in the Fourth Circuit. The court was apparently referring to a compilation of the results from the Fourth Circuit counties for statewide elections.

> Statistics provided by the [Fourth Circuit Judicial Nominating] Commission indicate that from 1987 to 1991, the Commission accepted applications for eleven circuit and county court vacancies. Of the total number of applicants, approximately eleven percent were black attorneys. An almost identical percentage of blacks were among the total number of nominees sent by the Commission to the Governor. Nine percent of the total appointments made by the Governor during this period were black (specifically, the county judge appointment in the summer of 1991).

Id. at 1538.

Moreover, the court emphasized, "in judicial elections, incumbency and name recognition are the primary factors behind electoral success." *Id.* Several witnesses testified to this effect. Indeed, only one of the twenty-eight incumbent circuit judges serving at the time of trial had ever faced electoral opposition subsequent to his or her initial appointment or election; none of the twelve incumbent county judges had ever been opposed in a reelection bid. Judge Adams agreed that incumbency is an important factor in determining the outcome of judicial elections and testified revealingly that "I don't think that a black could win a county-wide judicial election without the benefit of incumbency." By all accounts, the electoral benefits of incumbency accrue equally to black and white judges as none of the black judges on either the Fourth Circuit or Duval County Court benches has ever been opposed for reelection.

D.

The complaint in this case was filed in the United States District Court for the Middle District of Florida on July 5, 1990. The plaintiffs (the appellants here) challenged the method of electing judges for the Fourth Circuit and the Duval County Court under section 2 of

the Voting Rights Act as well as under the Fourteenth and Fifteenth Amendments of the Constitution; they alleged that those election systems unlawfully diluted the electoral strength of black voters.

Trial originally was scheduled for March 1991, but the district court stayed the proceedings pending the outcome of cases before the United States Supreme Court concerning the applicability of section 2 to judicial elections. After the Court confirmed that section 2 applies to the election of state court judges, *see Chisom v. Roemer*, 501 U.S. 380, 404, 111 S. Ct. 2354, 2368, 115 L. Ed. 2d348 (1991); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. at 419, 423-24, 111 S. Ct. 2376, 2379, 115 L. Ed. 2d 379 (1991), the trial of this case was reset and commenced on December 12, 1991.

To resolve the issue of whether voting in circuit and county judicial elections was racially polarized, both sides offered expert testimony and statistical evidence. The appellants relied on the testimony of Dr. Allan Lichtman, Professor of History at American University in Washington, D.C. The appellees offered two expert witnesses: Dr. Ronald Weber, Professor of Government at the University of Wisconsin, and Dr. Joan Haworth, former Professor of Economics at Florida State University and currently the president of a private consulting company. Although the ultimate conclusion reached by the two sides was different, the experts agreed on most of the foundational data. Indeed, all of these experts used the same or similar statistical techniques to analyze the election results at issue.[20] The experts divided sharply, however, over which types of elections should be analyzed in order to determine whether voting in Fourth Circuit and Duval County judicial elections has been, and continues to be, racially polarized.

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[20] All of the experts used ecological regression and extreme case analysis to study the voting behavior in the circuit and county judicial elections. As the district court explained:

The appellants' expert, Dr. Lichtman, studied the six circuit and county judicial elections in which black candidates have competed against white candidates since 1972.[21] He also analyzed numerous elections for offices not at issue in this litigation (referred to as "exogenous" elections) that involved black candidates, placing particular emphasis on Justice Hatchett's 1976 Florida Supreme Court reelection bid.[22] Almost all of the

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> Ecological regression analysis permits estimation of the voting behavior of racial groups through comparison of the racial composition of the population at each precinct to the division of the vote among competing candidates at each precinct. The regression analysis uses data from all of the precincts participating in an election, and produces estimates of the voting behavior of both whites and blacks.

Nipper, 795 F. Supp. at 1533. The experts in this case used substantially the same techniques that were approved (and relied on) by the Supreme Court in *Gingles*.

[21] To summarize, between 1972 and 1990, there were six contested elections for circuit and county judgeships in which black candidates participated. These elections involve only five seats because the first two were the primary and general elections for the same position. The elections and black candidates were: (1) 1972 Primary, Circuit Court, Leander Shaw; (2) 1972 Runoff, Circuit Court, Leander Shaw; (3) 1978 Primary, Circuit Court, Harrell Buggs; (4) 1978 Primary, Duval County Court, Alfred Washington; (5) 1984 Primary, Duval County Court, Denise Prescod; and (6) 1984 Primary, Duval County Court, Dietra Micks.

[22] The only exogenous election to which the district court attached significance in its opinion was the 1976 Florida Supreme Court election involving Justice Hatchett—a statewide race involving one black and one white candidate. The district court adopted Dr. Lichtman's regression results as findings of fact on this point; those results demonstrate that a majority of white voters in the circuit generally, and in Duval County in particular, supported Justice Hatchett's reelection, along with virtually all blacks voting. The court rejected Dr. Lichtman's attempts to tie this race to the other exogenous elections, however, suggesting that "equating Hatchett's non-partisan,lower profile, judicial election with Rev. [Jesse] Jackson's partisan, high profile, presidential election for the purpose of showing racial polari-

other exogenous elections studied by Dr. Lichtman were of a partisan nature (including Jesse Jackson's presidential primary campaigns in 1984 and 1988 and Alcee Hastings' various bids for statewide office). Based on his review of these elections, Dr. Lichtman concluded that voting in the Fourth Circuit and in Duval County is racially polarized in judicial elections: Black voters prefer black candidates by over whelming margins, but those candidates are not elected because they do not receive sufficient crossover votes from the white electorate.

According to the ecological regression studies, a large majority of black voters strongly supported the black candidate in each of the six circuit and county judicial elections. At the same time, the majority of white voters supported the white candidate, thereby resulting in the defeat of all of the black candidates except for Leander Shaw in the 1972 primary. Shaw, however, went on to lose in the general election. In these six elections, black support for the black candidates ranged from seventy-three to ninety-eight percent, while white support for those same black candidates varied from three to thirty-three percent. Black voter support for the white candidates never exceeded twenty-seven percent while white support for the white candidates ranged from sixty-seven to ninety-seven percent. The district court adopted Dr. Lichtman's statistical estimates concerning these six elections as findings of fact.[28] *Nipper*, 795 F. Supp. at 1534 n. 4.

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zation in circuit and county judicial elections is misleading." *Nipper*, 795 F. Supp. at 1535 n. 8. Although it made findings of fact concerning the results of various other elections, the district court "accorded little weight to these non-judicial, exogenous elections." *Id.* at 1535.

[28] Dr. Lichtman's ecological regression analysis revealed the following degrees of racial polarization in the Fourth Circuit and Duval County. It should be noted that one of the appellees' experts, Dr.

The principal expert witness for the defense, Dr. Weber, also reviewed the six circuit and county court campaigns in which black candidates participated. Dr. Weber also examined a set of elections that Dr. Lichtman had not.[24] Declining to confine his analysis of Fourth Circuit and Duval County judicial elections to those races in which a black candidate had competed,

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Haworth, produced estimates for these elections that were nearly identical to Dr. Lichtman's, even though she used a slightly different methodology.

	% of Black Voters Voting for Black Cand.	% of Black Voters Voting for White Cand.(s)	% of White Voters Voting for Black Cand.	% of White Voters Voting for White Cand.(s)
Fourth Circuit				
1972 Primary Leander Shaw				
Circuit	92	8	24	76
Duval Co.	93	7	23	77
1972 Runoff Leander Shaw				
Circuit	97	3	33	67
Duval Co.	98	2	32	68
1978 Primary Harrell Buggs				
Circuit	82	18	3	97
Duval Co.	81	19	4	96
Duval Co. Court				
1978 Primary Group 6				
A. Washington	88	12	13	87
1984 Primary Group 4				
Denise Prescod	73	27	31	69
1984 Primary Group 8				
Dietra Micks	76	24	4	96

[24] Dr. Haworth's role for the defense was to reexamine Dr. Lichtman's data, so she examined the same exogenous elections as Lichtman (albeit using as lightly different methodology) and reached a different conclusion. Dr. Haworth contended that any racial polarization in these elections was not significant, and that, indeed, strong support by black voters for black candidates corresponded to higher levels of white crossover votes.

Dr. Weber instead examined *all* of the judicial elections in the relevant jurisdictions between 1972 and 1990, even those in which only white candidates participated. In further refining his study sample, Dr. Weber "argued that only those non-judicial elections for low-visibility offices similar to judgeships would be of importance in a judicial elections case." *Id.* at 1533. Accordingly, he criticized Dr. Lichtman's reliance on high-profile elections for statewide or national office. Dr. Weber concluded that the candidate of choice of black voters wins elections in the Fourth Circuit and Duval County because of the high degree of black cohesion and sufficient white crossover voting—but he admitted on cross-examination that his conclusion should be qualified as follows: "These data show very clearly that black candidates of choice are regularly elected in both jurisdictions and white voters do not usually vote as a bloc to deny black voters the opportunity to elect candidates of choice to these judicial posts—so long as these candidates are white and not black." [25]

There were a total of nineteen contested elections for circuit judge between 1972 and 1990, of which sixteen involved only white candidates. Dr. Weber's analyses, which the district court "adopted as findings of fact for statistical purposes only," *id.* at 1534, revealed that the candidate of choice of black voters won thirteen, or sixty-eight percent, of these contested elections. During this same time period, there were twenty-four contested Duval County Court elections, three of which involved black candidates. Dr. Weber's study revealed that the candidate of choice of black voters won fourteen, or fifty-eight percent, of those elections. A somewhat different picture emerges, however, when "split preference" statistics are examined. Looking at both circuit

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[25] "Black candidate of choice" is a term of art referring to a candidate who is preferred by the majority of black voters, without reference to the candidate's race.

and county court races, Dr. Lichtman testified that the candidate preferred by black voters differed from the candidate preferred by white voters in nineteen of the thirty-seven contested judicial elections that involved only white candidates. In those "split preference" elections, the black voters' preferred candidate lost eighty-four percent of the time.

At trial, the appellants also introduced non-statistical evidence of Florida's history of discrimination against black citizens, including its legacy of disfranchisement and segregation in most areas of life.[26] In particular, Florida employed various franchise restrictions— from the poll tax to the white primary—for decades in an attempt to restrict the access of black voters to the ballot. Those classic discriminatory devices have been eliminated, however, and the consensus at trial was that there is currently little disparity in voter registration in the Fourth Circuit and in Duval County by race. Blacks of voting age are registered at higher rates than whites of voting age in both the Fourth Circuit and Duval County.

Despite the removal of overt badges of segregation, the district court nonetheless found that "black citizens in Florida still suffer in some ways from the effects of Florida's history of purposeful discrimination," particularly in terms of socio-economic disparities, such as family income and high school graduation rates. *Id.* at 1536. Black citizens in the region covered by the Fourth Circuit have lower median incomes than whites and are

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[26] Transportation facilities in Florida were segregated until the 1950s, and many area school systems still have not achieved unitary status. Moreover, until 1958, Florida refused to permit black students to attend the University of Florida College of Law. Florida A & M Law School was created in 1951 for black students but was not accredited until several years later. When the state opened another law school in Tallahassee in 1967 at Florida State University, it closed the law school at Florida A & M.

more likely to be unemployed and to fall below the poverty line. In addition, the limited evidence presented at trial (reflected in a consensus among the experts) suggested that, although little disparity exists in voter registration, black voter turnout appears to be slightly lower than white turnout. And the "rolloff" effect—which measures the number of voters who sign in at the polls but fail to cast a vote for a particular election on the ballot—is greater among black voters than white voters.

The appellants also introduced into evidence a report issued in 1990 by the Florida Supreme Court Racial and Ethnic Bias Study Commission [27] that, according to the district court, "documented numerous features of Florida's justice system that allegedly have an adverse effect on the dispensation of justice to minority citizens, including the under representation of minorities in the judiciary in comparison to the percentage of minorities in the total population." *Id.* at 1535. The Study Commission concluded:

> Clearly, the current election process, which provides for circuit-wide, at-large elections, is not yielding sufficient representation of minorities on Florida's bench. At the same time, the dramatic under representation of minority judges reflected in the ... statistics compels the conclusion that the appointive system, as currently structured and implemented, has itself failed to achieve racial and ethnic diversity. The Commission strongly believes that serious measures need to be considered for implementation—in both systems—which are aimed at producing a more racially and ethnically sensitive judiciary.

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[27] Judge Adams served on the Study Commission and described its composition and conclusions at trial. The Commission was appointed by the Florida Supreme Court and contained a cross-section of judges, lawyers, and lay citizens from various parts of the state.

To that end, the Study Commission recommended that the state legislature study the feasibility of utilizing subdistricts for judicial elections as a means of redressing prior discrimination and increasing minority representation on the bench.[28] The appellants established that the low number of minority judges on the trial courts cited by the Study Commission affects the perception, if not the reality, of the system's fairness; all of the witnesses acknowledged, however, that the judges of the Fourth Circuit and the Duval County Court are fair and impartial in their administration of justice without regard to race.

E.

The record in this case therefore reveals a somewhat conflicted picture of the judicial selection process in the Fourth Circuit and Duval County. On the one hand, all of the black candidates for judicial office in those jurisdictions have been defeated by their white opponents. Several of the elections involving black candidates also involved other special circumstances, such as incumbency, that cloud the issue of whether race was the factor most responsible for the outcome. On the other hand, black judges have been appointed to the bench under the merit selection nominating commission system roughly in proportion to the number of minority applicants;

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[28] The Study Commission highlighted its view of the need for heightened representation of minorities on the state's courts in a subsequent report issued in 1991:

> [T]he under representation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies or individual practices, unfair and insensitive to individuals of color.... [B]y threatening the withdrawal of the tacit "consent of the governed," the under representation of minorities in positions of responsibility in the judicial system weakens the very system of ordered liberty upon which our democracy is based.

once in office, moreover, those black judges have enjoyed the same benefits of incumbency as their white counterparts (including standing unopposed for reelection). The influence of the merit appointment system has been significant: Since its institution in 1972, more judges initially have reached the bench by appointment than by election.

Based upon this evidence, the district court issued an order containing findings of fact and conclusions of law on June 2, 1992. In that order, the court rejected all of the appellants' statutory and constitutional claims and denied relief. *Id.* at 1548. The court first ruled against the appellants on the critical issue of racially polarized voting, concluding that the statistical evidence, viewed in light of the special circumstances surrounding the judicial elections in question, failed to demonstrate sufficient racial bloc voting such that the white majority usually defeats the minority's preferred candidate.[29] *Id.* at 1543. The court then concluded alternatively that:

> [E]ven if Plaintiffs had made a sufficient showing of racial polarization, Defendants have offered overwhelming proof of objective factors in rebuttal that demonstrate, under the totality of the circumstances, that the social conditions in the Fourth Judicial Circuit and Duval County are such that their interactions with the electoral scheme do not, and will not, result in voting discrimination in the judicial elections under challenge.

Id. at 1548. Judgment was entered for the appellees that same day.

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[29] According to the district court, "this finding alone required a ruling in favor of the [appellants].... In the interests of providing a comprehensive opinion [, however,] the court [considered the appellees'] proof of other objective factors in rebuttal that indicate, under the totality of the circumstances, that the voting community is not driven by racial bias." *Nipper*, 795 F. Supp. at 1543 (citation omitted).

In this appeal, the appellants challenge only the district court's denial of their section 2 claim; this court is not asked to review the court's rulings on the constitutional issues. In an opinion issued on September 15, 1993, a panel of this court reversed, and remanded the case to the district court for the imposition "forthwith [of] an appropriate remedy." *Nipper v. Smith*, 1 F.3d 1171 (11th Cir.1993). Much of the panel's opinion was devoted to evaluating the evidence before the district court on the issue of racially polarized voting. According to the panel opinion, the district court had discounted the appellant's statistical evidence (which the district court had acknowledged would ordinarily be sufficient to establish racially polarized voting) for three reasons: because "(1) the judicial elections involving black candidates were stale; (2) black voters occasionally elected candidates of choice in elections involving only white candidates; and (3) two of the black-white elections involved incumbents." *Id.* at 1178-79. The panel "rejected as clear error each of the district court's reasons for concluding that appellants failed to show racial polarization" and held that "the evidence in the entire record demonstrates racially polarized voting in the Fourth Judicial Circuit and Duval County." *Id.* at 1181-82. In the panel's view, the district court also "erred in ruling that appellees discharged their burden of proving that the voting communities were not driven by racial bias"; specifically, the appellees had not shown "an absence of racially biased voting in the Fourth Judicial Circuit and Duval County." [30] *Id.* at 1184. Subsequently, we vacated the panel opinion and granted rehearing en banc. *Nipper v. Smith*, 17 F.3d 1352 (11th Cir. 1994).

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[30] As we discuss *infra* part V, after finding vote dilution in violation of section 2, a court, before imposing a remedy, should consider the state's argument that the remedy the plaintiffs propose is not feasible because, if implemented, it would undermine the administration of

II.

Section 2 of the Voting Rights Act, adopted in 1965 and amended in 1982, outlaws election practices that result in racial discrimination.[31] Of particular concern are electoral structures, such as at-large elections in areas with white majorities, that produce racial vote *dilution* because "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." [32] *Allen v. State Bd. of Elections*, 393

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justice in the challenged court. *Houston Lawyers' Ass'n*, 501 U.S. at 426, 111 S. Ct. at 2380-81. The appellees made such an argument in urging the panel to affirm the district court's denial of relief, but the panel, did not address the argument in its opinion.

[31] Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[32] This conclusion is not, however, universally accepted. *See, e.g., Holder v. Hall*, U.S. , , 114 S. Ct. 2581, 2603, 129 L. Ed. 2d 687 (1994) (Thomas, J., concurring) ("Properly understood, the terms 'standard, practice, or procedure' in § 2(a) refer only to practices that affect minority citizens' access to the ballot. Districting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted are simply beyond the purview of the Act.").

U.S. 544, 569, 89 S. Ct. 817, 833, 22 L. Ed. 2d 1 (1969) (emphasis added). Since racial and ethnic groups tend, at times, to be geographically compartmentalized in our society, a districting plan drawn without regard to the physical distribution of such groups may nevertheless operate to distort their relative voting strengths, as well as to provide the opportunity for subtle discrimination through the manipulation of electoral structures. Vote dilution cases involve allegations that the location of district lines or the use of other electoral practices, such as at-large voting, may " 'interact with social and historical conditions,' [thereby] impairing the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, U.S. , , 113 S. Ct. 1149, 1155, 122 L. Ed. 2d 500 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 2764, 92 L. Ed.2d 25 (1986)). Cases alleging a distortion of group voting power of this type have been termed "qualitative" (as opposed to quantitative)[33] reapportionment cases because they focus "not on population-based apportionment but on the quality of representation." *Whitcomb v. Chavis*, 403 U.S. 124, 142, 91S. Ct. 1858, 1868, 29 L. Ed. 2d 363 (1971)..

To prevail on a claim of vote dilution under section 2, plaintiffs generally must meet certain threshold requirements that the Supreme Court first identified in *Gingles*. Specifically, plaintiffs in vote dilution cases must establish as a threshold matter: (1) that the minori-

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[33] A case alleging violation of the one person, one vote standard, *see, e.g., Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), based solely on a mathematical analysis of population inequalities among voting districts, is generally termed a "quantitative" reapportionment case. The issue in such a case is whether population deviations from the average district are impermissibly large. The Supreme Court has held, however, that one person, one vote requirements do not apply to judicial elections. *See Wells v. Edwards*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973).

ty group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67; *Growe v. Emison*, U.S. , , 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388 (1993) (quoting *Gingles*). The second and third of these threshold preconditions, or factors, relate to the question of whether the challenged electoral scheme is abridging the right of the plaintiff minority group "to vote on account of race or color." The first precondition, or factor, asks whether the court can fashion a remedy for a demonstrated abridgement.[34]

In addition to the second and third preconditions, the *Gingles* Court identified other factors that may, in "the totality of the circumstances, "support a claim of racial vote dilution. Derived from the Senate Report accompanying the 1982 amendment to section 2, those factors include:

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[34] The Supreme Court developed the three-part *Gingles* threshold test in a case challenging North Carolina's multimember legislative district scheme. The remedy the plaintiffs sought in that case was the creation of single-member districts in which the minority voters they represented would constitute a sufficient majority to elect representatives of their choice. The first *Gingles* threshold factor addressed this remedy and asked, at the outset of the case,whether such districts could be drawn. If not, the case would have ended.

As we discuss in further detail, *infra* part III.B.1., the first *Gingles* threshold factor is properly read, in light of *Holder*, U.S. , 114 S. Ct. 2581, to stand for the broader proposition that a district court must determine whether it can identify an alternative electoral scheme against which to measure the existing voting practice. Outside of the multimember legislative district context, this benchmark scheme may or may not involve the use of single-member districts, depending on the facts of the case. In this case, we do not limit the remedy aspect of the vote dilution inquiry to whether single-member districts can be drawn, *see infra* part V.

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; [and] 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 37, 106 S. Ct. at 2759 (quoting S.Rep. No. 417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 177, 206-07). Additional factors that may be probative of vote dilution in some cases are:

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

[9.] whether the policy underlying the state or political subdivision's use of such voting qualifica-

> tion, prerequisite to voting, or standard, practice or procedure is tenuous.

Id., at 37, 106 S. Ct. at 2759.[35]

The *Gingles* Court emphasized that "this list of typical factors is neither comprehensive nor exclusive," *id.* at 45, 106 S. Ct. at 2763, although evidence of the third precondition, racially polarized voting, is "the linchpin of a § 2 vote dilution claim," *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir.1987), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213, 106 L. Ed.2d 564 (1989), and thus forms the basis of the *Gingles* threshold inquiry on the issue of liability (as opposed to remedy). Regardless of the particular factors that the plaintiff in a vote dilution case is able to demonstrate, however, the essence of a section 2 claim is that certain electoral characteristics, in conjunction with "social and historical conditions," operate to eviscerate the ability of minority voters to elect their candidates of choice. *Gingles*, 478 U.S. at 47, 106 S. Ct. at 2764; *see also Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1555 (11th Cir.1987), *cert. denied*, 485 U.S. 936, 108S. Ct. 1111, 99 L. Ed. 2d 272 (1988).

In 1990, this court divided on the issue of whether voting rights plaintiffs can establish a section 2 violation merely by satisfying the second and third *Gingles* threshold factors or whether the ultimate inquiry is always under the totality of the circumstances, such that

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[35] The Senate Report, in turn, drew on the decisions in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296 (1976). See S.Rep. No. 417, at 28 n. 113, *reprinted in* 1982 U.S.C.C.A.N. at 177, 206 n. 113. This development process is detailed in *Solomon v. Liberty County*, 899 F.2d 1012, 1021 (11th Cir.1990) (en banc) (Tjoflat, C.J., specially concurring), *cert. denied*, 498 U.S. 1023, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991).

the defendants have the opportunity to rebut the plaintiffs' showing of vote dilution—and thereby avoid liability—by demonstrating a lack of racial bias in the voting community.[36] *See Solomon v. Liberty County*, 899 F.2d 1012, 1017 (11th Cir.1990) (en banc) (per curiam) (division detailed in the concurring opinions of Kravitch, J., and Tjoflat, C.J.), *cert. denied*, 498 U.S. 1023, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991). The Supreme Court's recent decision in *Johnson v. De Grandy*, U.S. , 114 S.Ct. 2647, 129 L. Ed. 2d 775 (1994), has essentially resolved this issue as the following discussion indicates.

A.

Proof of the three core factors emphasized in *Gingles* is necessary, *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766, but not always sufficient, to establish a claim for relief under section 2. Rather, plaintiffs in such cases also must show that, under the totality of the circumstances, "they do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc) ("*LULAC*"), *cert. denied*, U.S. , 114 S. Ct. 878, 127 L. Ed. 2d 74 (1994).

In *Gingles*, the Court stated that, "as both amended § 2 and its legislative history make clear ... the trial court is

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[36] The division has been noted in several recent opinions of this court. *See, e.g., Hall v. Holder*, 955 F.2d 1563, 1568 n. 9 (11th Cir.1992) ("Although the *Gingles* factors may have been established in a particular case, the continuing role of the parties and of the court is unclear."), *rev'd*, U.S. , 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994); *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1544 (11th Cir.1990) ("The en banc court divided on the question of whether proof of the [second and third] *Gingles* factors was sufficient and whether a defendant could raise as a defense the lack of racial bias in the community."), *cert. denied*, 499 U.S. 907, 111 S. Ct. 1108, 113 L.Ed. 2d 217 (1991).

to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." [37] *Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781 (internal quotation marks and citation omitted). The *Gingles* threshold factors (specifically, the second and third) constitute "essentially a 'gloss' on the Senate factors and a limitation on the interpretation of those factors in proving a vote dilution claim." *Stallings*, 829 F.2d at 1555; *accord Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987). Thus, the *Gingles* Court did not decree that a plaintiff who proves the three preconditions invariably will win; instead, it merely held that the three factors are prerequisites to a successful claim.[38] *See Gingles*, 478 U.S. at 48 n. 15, 106 S. Ct. at 2765 n.15.

The Supreme Court's recent decision in *De Grandy*, U.S. , 114 S. Ct.2647, resolved any doubt as to the threshold nature of the *Gingles* factors. In *De Grandy*, a case involving a challenge to Florida's legislative reapportionment plan, the Court definitively characterized the "*Gingles* factors (compactness/numerousness, minority cohesion or bloc voting, and majority bloc voting) as "necessary preconditions,' for establishing vote dilution." [39] *Id.* at , 114 S. Ct. at 2657 (citation omitted). The

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[37] In *Hall*, a panel of this court recognized that "the *Gingles* majority did not ... limit the manner in which the [second and third] factors may be proven [and that] the totality of the circumstances surrounding a § 2 claim may properly be considered when determining whether plaintiffs have established the [those two] *Gingles* preconditions."

[38] Significantly, the *Gingles* Court itself discussed the broader totality of the circumstances after it had noted the plaintiffs' success in proving the three threshold factors. *See Gingles*, 478 U.S. at 80, 106 S. Ct. at 2781.

[39] In two other cases decided after *Gingles*, the Supreme Court reiterated that the *Gingles* core factors are threshold conditions. *See Growe*, U.S. at , 113 S. Ct. at 1083; *Voinovich*, U.S. at , 113 S. Ct. at 1157.

Court went on to say, however, that "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* at , 114 S. Ct. at 2657. Thus, under *De Grandy*, reviewing courts are required—not just invited—to look beyond the *Gingles* threshold factors when evaluating vote dilution claims.[40] As the Court stressed, "[l]ack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Id.* at , 114 S. Ct. at 2657. In *De Grandy*, the Court assumed that the *Gingles* preconditions had been satisfied, but nevertheless concluded that section 2 relief should not be granted because, notwithstanding the presence of continued discrimination and racial bloc voting, minority voters were able to form effective voting majorities in a number of legislative districts that were roughly proportional to their respective shares in the voting age population.[41] *See id.* at , 114S. Ct. at 2663.

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[40] The same point had been suggested in several of the Court's prior cases. In *Chisom*, for example, the Court held that the 1982 amendment to section 2 "make[s] clear that an application of the results test *requires* an inquiry into "the totality of the circumstances.' " *Chisom v. Roemer*, 501 U.S. 380, 393, 111 S. Ct. 2354, 2363, 115 L. Ed. 2d 348 (1991) (emphasis added). Similarly, the Court echoed in *Houston Lawyers' Ass'n* that "an analysis of the totality of the circumstances ... *must be considered* in an application of the results test embodied in § 2, as amended." *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419, 426, 111 S. Ct. 2376, 2381, 115 L. Ed. 2d 379 (1991) (emphasis added).

[41] *De Grandy* therefore discusses a new element—proportionality—to be weighed in the totality of the circumstances. As the Court explained, "one may suspect vote dilution from political famine, but one

As an initial matter, therefore, proof of the *Gingles* threshold factors is a necessary precondition to section 2 relief; such a showing, however, will not guarantee relief. A defendant in a vote dilution case may always attempt to rebut the plaintiff's claim by introducing evidence of objective, non-racial factors under the totality of the circumstances standard.[42] Indeed,

> if the Court meant to deny the defendant an opportunity to rebut the plaintiff's case after the plaintiff has offered evidence of the three factors, then the three factors would be both necessary *and always sufficient* to win under section 2.... The Court's adherence to the totality-of-the-circumstances test *must* mean that the defendant can rebut the plain-

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is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *De Grandy*, U.S. at , 114 S. Ct. at 2660. Nevertheless, "while proportionality in the sense used here is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, "to participate in the political process and to elect representatives of their choice,' 42 U.S.C. § 1973(b), the degree of probative value assigned to proportionality may vary with other facts." *Id.* at , 114 S. Ct. at 2661.

[42] This is precisely what the Supreme Court permitted the defendants to do in *De Grandy*. In that case, "the District Court found that the three *Gingles* preconditions were satisfied, and that Hispanics had suffered historically from official discrimination, the social, economic, and political effects of which they generally continued to feel." *De Grandy*, U.S. at , 114 S. Ct. at 2656. The Court concluded that, even with all three *Gingles* conditions satisfied, the circumstances in totality would not support a finding of vote dilution where Hispanics could be expected to elect their preferred candidates in proportion to their percentage of the area's population. *Id.* at , 114 S.Ct. at 2663. In that context, the District Court was not critical enough in asking whether a history of persistent discrimination reflected in the larger society and its bloc-voting behavior portended any dilutive effect from a newly proposed districting scheme, whose pertinent features were majority-minority districts in substantial proportion to the minority's share of voting-age population." *Id.* at , 114 S. Ct. at 2658.

> tiff's claim—even after the plaintiff has offered proof of the three *Gingles* factors.

Solomon, 899 F.2d at 1035 (Tjoflat, C.J., specially concurring). Because the ultimate inquiry is under the totality of the circumstances, courts must consider not only evidence of the *Gingles* threshold factors but also any other evidence offered by the parties that is relevant to the statutory test. It may well be true, as the Third Circuit has suggested, that "it will be only the very unusual case in which the plaintiffs can establish the ... *Gingles* [threshold] factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir.1993). Nevertheless, the Supreme Court cautions:

> To be sure, some § 2 plaintiffs may have easy cases, but although lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the ... essential *Gingles* factors, that conclusion must still be addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment.

De Grandy, U.S. at , 114 S. Ct. at 2657. It is, therefore, under the totality of the circumstances that courts must decide, in the final analysis, whether a violation of section 2 has been established.

B.

Given that courts evaluating section 2 claims must look beyond the *Gingles* threshold factors, we must determine what constitutes a violation of the statute's "results" test under the totality of the circumstances. As the Supreme Court has stated, section 2 "make[s] clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent [in

the adoption or maintenance of those practices and procedures] protects them from constitutional challenge" under the Fourteenth and Fifteenth Amendments. *Chisom v. Roemer*, 501 U.S. 380, 383-84, 111 S. Ct. 2354, 2358, 115 L. Ed. 2d 348 (1991). The concern thus becomes what proof is required to satisfy the results test, as well as what form of intent inquiry is forbidden thereunder.[48]

We hold that section 2 prohibits those voting systems that have the effect of allowing a community motivated

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[48] Initially, it bears noting that the Supreme Court itself was divided in *Gingles* on this point. In a concurring opinion joined by three other justices, Justice O'Connor wrote:

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates....
>
> ... The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation.

Gingles, 478 U.S. at 100-01, 106 S. Ct. at 2792 (O'Connor, J., concurring). Justice White wrote separately, suggesting that he would find it significant if partisan affiliation—and therefore not race—were shown to be the consideration driving the election results. *Id.* at 83, 106 S. Ct. at 2783 (White, J., concurring). Justice Brennan, the author of the majority opinion, took the contrary position: "Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent." *Id.* at 74, 106 S. Ct. at 2778. Only three other justices joined the portion of Justice Brennan's opinion discussing this issue, however.

by racial bias to exclude a minority group from participation in the political process. Therefore, if the evidence shows, under the totality of the circumstances, that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made. Our interpretation of the Voting Rights Act is supported by the text of the statute, the legislative history accompanying the 1982 amendment to section 2, and the Supreme Court's vote dilution cases. We now discuss these sources in greater detail.

1.

At first glance, the language of section 2, as amended in 1982, appears somewhat inconsistent and unclear. Subsection (a) forbids the use of electoral structures that "result[ ] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Subsection (b), on the other hand, appears more generous, explaining that a violation of subsection (a) is established if members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). We believe, however, that the statutory language, when properly understood, circumscribes the universe of prohibited electoral structures and requires more than a mere showing of electoral losses at the polls by minority candidates.

The appellants argue that the language of section 2 requires nothing more than proof of disparate election results—i.e., that, when observed from a numerical/success rate point of view, minorities have less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. Such proof, they argue, sufficiently demonstrates the required denial or abridgement of a minority group's right to vote.

This reading of section 2, however, ignores crucial portions of the language in both subsection (a) and subsection (b). It is an axiomatic principle of statutory construction that statutes are to be read in their entirety, not in the piecemeal fashion employed by the appellants. Accordingly, we "follow the cardinal rule that a statute is to be read as a whole, see *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S. Ct. 1668, 1673, 104 L. Ed. 2d 98 (1989), since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, , 112 S. Ct. 570, 574, 116 L. Ed. 2d 578 (1991). When the entire statutory provision is examined, it becomes clear that the well-known first portion of subsection (b) can only be understood in light of subsection (a), which requires that the denial or abridgement of the right to vote be "on account of race or color," and the final clause of subsection (b), which makes clear that the 1982 amendment was not designed to create a right of proportional representation. This comprehensive reading plainly precludes the appellants' interpretation of section 2.

First, the language of section 2 as amended, by prohibiting voting structures that "result[] in a denial or abridgement of the right of any citizen of the United States *to vote on account of race or color*," explicitly retains racial bias as the gravamen of a vote dilution claim. 42 U.S.C. § 1973(a) (emphasis added). The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause. As the Fifth Circuit has explained, "the scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color.' " *LULAC*, 999 F.2d at 850.

Furthermore, this linguistic conclusion is supported by the fact that any other reading might well render section 2 outside the limits of Congress' legislative powers and therefore unconstitutional. It is important to remember that the Voting Rights Act was adopted pursuant to Congress' authority to enforce the Fourteenth and Fifteenth Amendments. The Civil War Amendments to the Constitution were designed to remedy pervasive racial discrimination, and Congress has broad power to enforce those amendments by appropriate legislation.[44] Congressional actions, however, must remain rooted in the purpose of the amendments. Accordingly, the Supreme Court has upheld the ban on electoral changes in section 5 of the Voting Rights Act (the preclearance provision) because "the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." *City of Rome v. United States*, 446 U.S. 156, 177, 100 S. Ct. 1548, 1562, 64 L. Ed. 2d 119 (1980). Thus, Congress' decision to include and retain the "on account of race or color" language was not merely fortuitous. Indeed, "this limitation was not so much the product of legislative discretion as constitutional imperative, given that the scope of Congress' remedial power under the Civil War Amendments is defined in large part by the wrongs they prohibit." *LULAC*, 999 F.2d at 854. As the Senate Judiciary Committee concluded, the proposed amendment to section 2 was constitutional because of "the very terms and operation of the provision, which confine its application to actual racial discrimination." S.Rep. No. 417, at 43, *reprinted in* 1982 U.S.C. C.A.N. at 177, 221.

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[44] Congress' authority to enforce the Civil War Amendments approximates its power under the Necessary and Proper Clause, as described by *McCulloch v. Maryland*, 17 U.S. 316, 4 L. Ed. 579 (1819), to implement the powers granted by Article I. *See City of Rome v.*

In addition, to accept the appellants' interpretation of section 2—that is,to read the "on account of race" language out of the statute by allowing section 2 plaintiffs to establish a violation merely by proving numerical differences in representation levels—would be to create a *de facto* right to proportional representation, a result explicitly prohibited by section 2 itself.[45] *See* 42 U.S.C.

United States, 446 U.S. 156, 174-77, 100 S. Ct.1548, 1560-61, 64 L. Ed. 2d 119 (1980) (approving the preclearance provisions of section 5 of the Voting Rights Act while expressing no opinion as to the constitutionality of section 2). Indeed, the Court held that "Congress may prohibit practices that in and of themselves do not violate § 1 of the [Fifteenth] Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate' as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia*, 100 U.S. 339 [25 L. Ed. 676] (1880)." *City of Rome*, 446 U.S. at 177, 100 S. Ct. at 1561-62. Quoting *Ex parte Virginia*, 100 U.S. at 345-46, the Court explained in *South Carolina v. Katzenbach*, 383 U.S. 301, 327, 86 S. Ct. 803, 818, 15 L. Ed. 2d 769 (1966), that:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Similarly, in *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 1724, 16 L. Ed. 2d 828 (1966), the Court held that legislation enacted pursuant to section 5 of the Fourteenth Amendment would be upheld as an appropriate exercise of congressional power if the statute " 'is plainly adapted to [the] end' " of enforcing the Equal Protection Clause and "is not prohibited by but is consistent with 'the letter and spirit of the constitution,' " regardless of whether the practices outlawed by Congress violated the Equal Protection Clause in and of themselves.

[45] In amending section 2, the Judiciary Committee noted, with approval, that "*Whitcomb [v. Chavis]* and *White [v. Regester]* both recognized that, in order to prevail, plaintiffs had to prove more than that minority members had not elected legislators in proportion to their percentage of the population." S.Rep. No. 417, at 23, *reprinted in* 1982 U.S.C.C.A.N. at 177, 200; *see also id.* at 34, *reprinted in* 1982

U.S.C. § 1973(b) ("Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). For, under the appellants' reading, courts would do no more than simply determine whether black voters are able to elect their candidates of choice and whether they might be more effective under a different electoral arrangement. Taken a step further, the appellants' interpretation necessarily requires a finding that, whenever minority candidates are not succeeding in at-large elections despite the fact that the minority population is reasonably large and politically cohesive, the only possible explanation for the minority candidates' lack of success is white bloc voting. Such a holding would amount to no less than the creation of a right to proportional representation, while also serving to eviscerate the very reason for the adoption of the Voting Rights Act—to prevent the abridgement of the right to vote "on account of race."

2.

An examination of the legislative history surrounding the 1982 amendment to the Voting Rights Act (along with the Supreme Court cases that preceded that legislation) confirms that racial bias in the voting community remains the keystone of section 2 vote dilution claims.

a.

Congress amended section 2 in 1982 to overturn the plurality decision of the Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L.Ed. 2d 47

U.S.C.C.A.N. at 177, 212 ("If the mere existence of under representation plus a history of dual schools had been sufficient under *White*, then plaintiffs would have won in every lawsuit brought in the Fifth Circuit [after *Zimmer*], which was clearly not the case.").

(1980), which had announced a standard requiring plaintiffs in vote dilution cases to prove that "the disputed [electoral] plan was 'conceived or operated [as] a purposeful device to further racial ... discrimination,' " id. at 66, 100 S. Ct. at 1499 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L. Ed. 2d 363 (1971)). The report on the proposed amendment issued by the Senate Judiciary Committee stated that the statutory changes were intended to codify the "results" test of *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L. Ed. 2d 314 (1973), which had established the vote dilution standard that applied before *Bolden*.[46] In response to concerns that the results test embodied in section 2 as amended would prove difficult to interpret, the Committee stressed that the amendment "codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and extensive case law which de-

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[46] *See* S.Rep. No. 417, at 2, *reprinted in* 1982 U.S.C.C.A.N. at 177, 179. Similar statements are found throughout the Judiciary Committee's report. *See, e.g., id.* at 15, *reprinted in* 1982 U.S.C.C.A.N. at 177, 192 ("The proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden.*"); *id.* at 27, *reprinted in* 1982 U.S.C.C.A.N. at 177, 205 ("The 'results' standard is meant to restore the pre-*[Bolden]* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote. Specifically, subsection (b) embodies the test laid down by the Supreme Court in *White.*"). Confirmation of this congressional intention can be gleaned from remarks made during the floor debates on the Voting Rights Act amendments. For a more detailed discussion of this material, see *Solomon*, 899 F.2d at 1028-31 (Tjoflat, C.J., specially concurring); *see also Gingles*, 478 U.S. at 97, 106 S. Ct. at 2790 (O'Connor, J., concurring) ("In enacting § 2, Congress codified the 'results' test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb.*"); *LULAC*, 999 F.2d at 851 ("The 1982 amendments to § 2 were intended to 'codify' the results test as employed in *White* and *Whitcomb.*").

veloped around it, into the application of Section 2." S.Rep. No. 417, at 32, *reprinted in* 1982 U.S.C.C.A.N. at 177, 210. Because of this stated purpose to return the section 2 burden of proof to pre-*Bolden* standards,[47] "it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2." *Gingles*, 478 U.S. at 97, 106 S. Ct. at 2791 (O'Connor, J., concurring).

The Supreme Court began the development of a standard for racial vote dilution cases in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971), which involved a challenge to the multimember, at-large legislative district scheme in Marion County, Indiana (the Indianapolis area). In that case, black voters claimed that the use of at-large elections diluted the voting strength of minorities in violation of the Equal Protection Clause of the Fourteenth Amendment.[48] After noting that multimember district systems are not per se unconstitutional, *id.* at 142, 91 S. Ct. at 1868, the Court determined that they "may be subject to challenge

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[47] Several decisions of this court have recognized that Congress intended the 1982 amendment to section 2 to restore the standard that governed vote dilution cases before *Bolden*. *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d 1546, 1562-63 (11th Cir.), *cert. denied*, 469 U.S. 976, 105 S. Ct. 375, 83 L.Ed.2d 311 (1984); *see also McMillan v. Escambia County*, 748 F.2d 1037, 1041 (Former 5th Cir. 1984).

[48] The Fourteenth Amendment states, in pertinent part, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial ... elements of the voting population,' " *id.* at 143, 91 S. Ct. at 1869 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S. Ct. 498, 501, 13 L.Ed. 2d 401 (1965)). The Court then turned to the question of how such unconstitutional vote dilution could be proved.

The Court first noted that any schemes "conceived or operated as purposeful devices to further racial discrimination" would be struck down under the Equal Protection Clause. *Id.* at 149, 91 S. Ct. at 1872. It found, however, that the plaintiffs had made no showing that the system used in urban Indianapolis had been explicitly designed or maintained by the relevant public officials to dilute the minority vote. *Id.* The Court then shifted its attention from the intent of the legislators who had framed the electoral system to conditions in the voting community as a whole. The Court stressed that invidious discrimination could not satisfactorily be proved through evidence of minority candidates' lack of success "absent evidence and findings that [minority voters] had less opportunity than did other Marion County residents to participate in the political process and to elect legislators of their choice." *Id.* To make this showing, the Court explained that plaintiffs could rely on evidence of various objective factors, such as limitations on minority registration or participation in political parties, that are probative of the presence or absence of racial bias in all levels of the political community and not just of "official" discrimination by legislators.[49] Thus, *Whitcomb*

[49] In *Whitcomb*, the Court concluded that the evidence of objective factors demonstrated a lack of racial bias in the voting community. Nothing in the record suggested that black citizens were prevented from registering to vote, were excluded from political parties, or were overlooked in the candidate slating process. Had the Democrats won more elections, the Court concluded, the black community would have had no complaints about its representation. Because most of the elections under consideration were won by Republicans, however,

indicates that the actions of the members of the voting community as a whole, not just the conduct of officials responsible for designing or maintaining the electoral structure at issue, are relevant to inquiries into discrimination in the voting process.

In *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314, the Supreme Court retained proof of invidious discrimination as a requirement of a successful vote dilution case brought under the Equal Protection Clause. The Court explained that, in vote dilution cases, it had "entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups." *Id.*, 412 U.S. at 765, 93 S. Ct. at 2339. The plaintiffs in *White* challenged, under the Fourteenth Amendment, the multimember legislative apportionment plan, which employed multimember districts in certain Texas counties. Accordingly, in framing the constitutional issue before it, the Court explained that it was required to determine whether the use of multimember districts had "been invidiously discriminatory against cognizable racial or ethnic groups in those counties." *Id.* at 756, 93 S. Ct. at 2335.

The plaintiffs in *White* apparently never attempted to demonstrate invidious discrimination through proof of the subjective intent of the legislators who designed or maintained the challenged election scheme. Instead, the plaintiffs only offered—and the Court only discussed—circumstantial evidence that pointed to objective factors that, like those in *Whitcomb*, shed light on the presence or absence of racial bias in the voting

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"the failure of the [black community] to have legislative seats in proportion to its population[ ] emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' ..., but this seems more a euphemism for political defeat at the polls." *Whitcomb*, 403 U.S. at 153, 91 S. Ct. at 1874.

community. Echoing the language used in *Whitcomb*, the Court framed the relevant standard as follows:

> To sustain [vote dilution] claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 765-66, 93 S. Ct. at 2339. The Supreme Court approved the district court's use of several objective factors to determine whether the plaintiffs had met this burden of proof. Those factors included the state's history of official racial discrimination; the use of certain voting structures that, although not in themselves improper or invidious, nevertheless enhanced the opportunity for racial discrimination; the influence of all-white political organizations over the process; and the use of overt racial campaign tactics to defeat candidates supported by the black community. *See id.* at 766-67, 93 S. Ct. at 2339-40. Based upon an evaluation of these factors, the Court affirmed the district court's determination that the minority population had been excluded unconstitutionally from the political process in those Texas counties.

The relevance of the objective factors discussed in *White* clearly was not limited to the narrow issue of legislators' intent in the adoption or maintenance of a challenged voting scheme. Instead, those factors were indicative of racial bias in the political community as a whole and of interaction between that bias and the challenged electoral structure. The opportunity, or lack of opportunity, to participate in the political process was

proved in *White* with objective factors that indicated that the voting scheme, "overlaid, as it was, on the cultural and economic realities of the [minority] community in Bexar County and its relationship with the rest of the county," closed the political process to the minority group. *Id.* at 769, 93 S.Ct. at 2341.

Whitcomb and *White* thus established that proof of invidious discrimination constituted an essential element of voting rights claims under the Equal Protection Clause. Plaintiffs could establish this element: (1) by proving that the legislators or other officials intended to enact or maintain a discriminatory voting scheme; *or* (2) by demonstrating objective factors indicating that the minority group has less opportunity to participate in the political process and to elect officials of its choice. As Justice White recently explained, *Whitcomb* and *White* carry the following theme: "It is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned." *Shaw v. Reno,* U.S. , , 113 S. Ct. 2816, 2835, 125 L. Ed. 2d 511 (1993) (White, J., dissenting).

It was against this jurisprudential backdrop that a plurality of the Supreme Court in *Bolden* eliminated the second of these two methods of establishing invidious discrimination available to voting rights plaintiffs under *Whitcomb* and *White*—objective factors indicating that the minority group has less opportunity to participate in the political process and to elect officials of its choice. Specifically, the *Bolden* plurality held that plaintiffs in voting rights cases, whether claiming a violation of the Fourteenth Amendment, Fifteenth Amendment, or section 2 of the Voting Rights Act, "must prove that the disputed plan was 'conceived or operated as [a] purposeful device to further racial ... discrimination.' " [50] *Bolden,* 446 U.S. at 66, 100 S. Ct. at 1499 (quoting *Whitcomb,* 403 U.S. at 149, 91 S. Ct. at 1872). *Bolden* involved a challenge to the at-large system of elections for the

three-member city commission governing Mobile, Alabama, whose members jointly exercised legislative and executive power. In rejecting each of the plaintiffs' claims, the plurality read the same intent requirement into both the Civil War Amendments and section 2: An electoral scheme would be invalidated only where the plaintiff could prove racially discriminatory intent on the part of legislators (or other relevant officials) in designing or maintaining the challenged scheme.[51] *See id.* at 62, 66-67; 100 S. Ct. at 1499-1500.

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[50] The plurality reviewed many cases in the process of distilling this intent test, and it imported from those cases the basic principle that purposeful discrimination is a requirement for a violation of the Fifteenth Amendment, citing *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed.2d 110 (1960), and *Wright v. Rockefeller*, 376 U.S. 52, 84 S. Ct. 603, 11 L. Ed.2d 512 (1964), and of the Fourteenth Amendment, citing *Washington v. Davis*, 426U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct.2282, 60 L. Ed. 2d 870 (1979). *See Bolden*, 446 U.S. at 62-63, 66-67, 91 S. Ct.at 1497, 1499. The plurality held that, as a matter of statutory construction, "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.* at 60-61, 100 S. Ct. at 1496 (footnote omitted).

[51] Further evidence that the plurality was altering the standard established in *Whitcomb* and *White* can be derived from the Court's holding that the objective factors discussed in those opinions could not provide sufficient proof of the discriminatory purpose the plurality opinion now required. *See Bolden*, 446 U.S. at 73, 100 S. Ct. at 1502-03. As we explain above, those factors are relevant to a determination of racial bias in the voting community as a whole, not to racial motivations on the part of the creators of a state's electoral scheme. Thus, the *Bolden* plurality's holding that the circumstantial evidence factors alone could not support a finding of invidious discrimination indicates that only evidence of racial bias on the part of legislators or other responsible officials could demonstrate the required discriminatory purpose.

Thus, the legislative history surrounding the 1982 amendment to section 2 supplies significant insight into Congress' intent to overturn the *Bolden* intent test by codifying *White*. The Judiciary Committee's report makes clear that amended section 2 restored the pre-*Bolden* standard by eliminating the absolute requirement that plaintiffs prove a discriminatory intent on the part of the legislators or officials responsible for designing or maintaining the challenged electoral scheme. The 1982 amendment, however, was not designed completely to eliminate consideration of the presence or absence of racial bias from the vote dilution inquiry; instead, it was meant merely to restore the invidious discrimination requirement as articulated by the *Whitcomb* and *White* Courts. Thus, under section 2 as amended, a plaintiff once again may demonstrate a violation by proving either: (1) the subjective discriminatory motive of legislators or other relevant officials; or (2) the existence of objective factors demonstrating that the electoral scheme interacts with racial bias in the community and allows that bias to dilute the voting strength of the minority group.

b.

Appearing before this court as amicus curiae on behalf of the United States, the Department of Justice joined the appellants in opposing the foregoing reading of the legislative history and pre-amendment case law surrounding section 2. The Department contends that section 2 does not require any proof whatsoever of intentional discrimination or racial animus; to consider a lack of racial bias in the voting community as a means of avoiding a section 2 vote dilution claim under the totality of the circumstances, the Department contends, would be to reintroduce the type of intent-based inquiry

that Congress repudiated in the 1982 amendment.[52] This position, however, ignores the very important distinction between racial bias in general and racially discriminatory intent on the part of legislators in particular. Some might suggest that the standard we enunciate today is nothing more than a return to the discredited *Bolden* test. Because of the symbolic power of that characterization, we address the Department's reading of the legislative history in some detail.

In support of its position, the Department of Justice focuses upon certain language in the Judiciary Committee's report, particularly the comment that "the specific intent of [the 1982] amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep. No. 417, at 28, *reprinted* in 1982 U.S.C.C.A.N. at 177, 205-06.This expression of legislative intent, the Department argues, forecloses the reading into the statute of any requirement that the presence or absence of racial bias in the voting community be considered in determining whether a section 2 violation has been established.

As noted above, however, the overriding intent of the 1982 amendment to section 2, as expressed repeatedly in the Senate Report, was to reject the position of the plurality in *Bolden*, "which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." *Gingles*, 478 U.S. at 43-44, 106 S. Ct. at 2762-63. The Department of Justice, however, contends that the goals Congress sought to achieve were broader:

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[52] The Department's argument is essentially the same as that advanced by Justice Brennan in a portion of his *Gingles* opinion that commanded the support of only a plurality of the Court. Justice Brennan contended that requiring section 2 plaintiffs to prove that the failure of minority voters to elect representatives of their choice was attributable to racial considerations would "frustrate the goals Congress sought to achieve by repudiating the intent test of [Bolden]." *Gingles*, 478 U.S. at 71, 106 S. Ct. at 2777.

to divorce the issue of racial bias from the section 2 inquiry altogether and essentially to limit the relevant considerations to the rate of minority electoral success at the polls. "Given the palpable tension between 'the goals Congress sought to achieve' and those it actually expressed, it is hardly surprising that the principles [the appellants] purport[ ] to locate in the Senate Report bear only a passing resemblance to those offered by Congress." *LULAC,* 999 F.2d at 862. The Senate Report leaves no doubt that Congress' view of the vice of the *Bolden* decision comports with our description above:

> In pre-*Bolden* cases plaintiffs could prevail by showing that a challenged election law or procedure, in the context of the total circumstances of the local electoral process, had the result of denying a racial or language minority an equal chance to participate in the electoral process. Under this results test, it was not necessary to demonstrate that the challenged election law or procedure was designed or maintained for a discriminatory purpose.

S.Rep. No. 417, at 16, *reprinted* in 1982 U.S.C.C.A.N. at 177, 193. The Committee thus concluded that the *Bolden* "intent test places an unacceptably difficult burden on plaintiffs" because "it diverts the judicial [inquiry] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives." *Id.* The *Whitcomb* and *White* decisions, in the Committee's view, were correct because "in neither ...did the Supreme Court undertake a factual examination of the intent motivating those who designed the electoral districts at issue." *Id.* at 22, *reprinted* in 1982 U.S.C.C.A.N. at 177, 200.

In context, therefore, the phrases from the Senate Report highlighted by the Department of Justice and the appellants refer to this particular form of intent.[59] The

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[59] Our reading of the Senate Report comports with the conclusion reached by the Fifth Circuit. See *LULAC,* 999 F.2d at 862 ("The

Report states that the intent test "asks the wrong question" precisely because it probes the racial motivations of lawmakers (and not because it inquires into racial bias in general):

> [I]f an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance.... If [minorities] are denied a fair opportunity to participate ... the system should be changed, regardless of what may or may not be provable about events which took place decades ago.

S.Rep. No. 417, at 36, *reprinted* in 1982 U.S.C.C.A.N. at 177, 214; *see also Shaw,* U.S. at , 113 S. Ct. at 2823 ("In 1982, [Congress] amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent."). Statements in the Report about avoiding a requirement that plaintiffs prove "discriminatory intent" must be considered in light of the meaning provided to that phrase in the document as a whole, wherein the Committee expressed its intent to overturn the *Bolden* legislative intent requirement. The many references to "intent," "motivation," and "purpose" throughout the report therefore must be read to refer to the intent of those responsible for erecting or maintaining the challenged scheme.[54]

Senate Report quite unambiguously declares that Congress intended to "make clear that plaintiffs need not prove a discriminatory purpose *in the adoption or maintenance* of the challenged practice or system in order to establish a violation.' ").

[54] In the section of the Senate Report dealing with the operation of amended section 2, the Committee consistently contrasts the results test, which it adopts, with the forbidden intent test, because the former avoids inquiry into the motivations of legislators. For example, the Committee noted:

Not only does the context of the passage from the Senate Report clearly indicate what Congress meant by forbidden inquiry into discriminatory intent, but the Committee's language in other sections of its report also demonstrates a congressional desire to retain a basic inquiry into racial bias in the voting community—an inquiry that is qualitatively different from the question whether a challenged election law or procedure was designed or maintained for a discriminatory purpose. The Senate Report explains:

> The results test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

S.Rep. No. 417, at 34, *reprinted in* 1982 U.S.C.C.A.N. at 177, 212. The Judiciary Committee thus explicitly recog-

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> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system [or] practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

S.Rep. No. 417, at 27, *reprinted in* 1982 U.S.C.C.A.N. at 177, 205 (footnote omitted). The Committee continued: "If the plaintiff proceeds under the 'results test', then the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance." *Id.* The Committee, therefore, drew a distinction between the forbidden inquiry into the motives of the designers of an electoral scheme and the use of objective factors to evaluate whether minorities are denied equal access to the political process on account of race—an evaluation that focuses on racial bias in the voting community.

nized the need to prove this interaction between the challenged scheme and racial bias in the community. Discussing the standard developed in *Whitcomb, White,* and *Zimmer,* the Committee stated that, "under the results test, the courts distinguished between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." [55] *Id.* at 33, *reprinted in* 1982 U.S.C.C.A.N. at 177,211. In the latter, "it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test." *Id.* But where racial politics—characterized by the interaction between racial bias and the political system—plays a large role, the outcome is different. The Committee explained:

> Unfortunately, ... there still are some communities in our Nation where racial politics do dominate the electoral process.
>
> In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections.

Id. The Judiciary Committee therefore conceived of racial bias at work in the electoral process as the key to separating, within the meaning of the Voting Rights Act, those jurisdictions in which minority voters have an

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[55] The Committee developed a list of objective factors, culled from the *White* and *Zimmer* opinions, that should be used to evaluate whether, under section 2, members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. These objective factors, as discussed above, bear on the existence or nonexistence of racial bias in the community as a whole.

equal opportunity to participate from those in which they do not.[56]

Contrary to the assertion of the appellants and the Department of Justice, permitting inquiry into racial bias would not reintroduce into section 2 cases the divisiveness that Congress sought to eliminate. In language heavily relied on by these parties, the Senate Report explains that exploring racial motivations as an element of proof is divisive because "it involves charges of racism on the part of individual officials or entire communities." *Id.* at 36, *reprinted in* 1982 U.S.C.C.A.N. at 177, 214. Significantly, however, the Senate Report continues on in the very same paragraph to reproduce testimony suggesting that this concern arises because, under the *Bolden* intent test, "litigators representing excluded minorities will have to explore the *motivations of individual council members, mayors, and other citizens.* The question would be whether their decisions were motivated by invidious racial considerations." *Id.* (emphasis added). Moreover, an inquiry into racial bias in the voting community, using objective factors, does not require that any individuals be labelled as racists because section 2 contemplates proof by circumstantial evidence.[57]

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[56] As a panel of this court has explained, "this section of the Senate Report makes it clear that section 2 is intended not to create race-conscious politics, but to remedy it where it already exists." *Marengo*, 731 F.2d at 1567.

[57] As Professor (and now Solicitor General) Drew Days testified during the congressional hearings, "in those jurisdictions where the evidence supports the conclusion that a combination of public and private actions, over time, have succeeded in 'fencing out' minorities from the electoral process, [it is] difficult to understand how requiring that corrective measures be undertaken brands that community and its officials as 'racists,' as some critics of the proposed Amendment have suggested." Hearings on the Voting Rights Act Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong.,2d Sess. 1402 (statement of Prof. Drew S. Days, III, Yale Law School).

3.

The legislative history, therefore, does not reveal an intent on the part of Congress to limit the section 2 inquiry to numbers alone, without any corresponding consideration of racial bias. Such a position directly contravenes the language of section 2, which prohibits voting practices that deny minority voters equal access to the political process *on account of race.* Indeed, "without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense 'discriminatory,' and any distinction between deprivation and mere losses at the polls becomes untenable." *LULAC,* 999 F.2d at 850. As we have emphasized, and as the Supreme Court recognized in *Gingles,* "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." [58] *Gingles,* 478 U.S. at 47, 106 S. Ct. at 2764. Unless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution.

C.

In summary, a plaintiff must prove invidious discrimination in order to establish a violation of section 2 of the Voting Rights Act. Specifically, the plaintiff may prove *either:* (1) discriminatory intent on the part of legislators

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[58] *See also id.* at 1367-68 (statement of Prof. Days) (explaining that 1982 amendment to section 2 was designed to restore a remedy in cases "where a combination of public activity and private discrimination have joined to make it virtually impossible for minorities to play a meaningful role in the electoral process").

or other officials responsible for creating or maintaining the challenged system; *or* (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme. Given the obvious fact that evidence of legislators' bias will generally be difficult to find, we envision that section 2 plaintiffs usually will pursue the second option, the "results test."

The contours of the proper inquiry under the results test emerge from the Supreme Court's opinion in *Gingles*, which identified three preconditions to obtaining relief under section 2.[59] A plaintiff cannot obtain relief unless he or she can establish: (1) the existence of a permissible remedy (in legislative cases like *Gingles*, the existence of a sufficiently large and compact minority group to constitute a single-member district); (2) that the minority group is politically cohesive; and (3) that the white majority typically votes as a bloc so as to defeat the black community's preferred candidate. *See id.* at 50-51, 106S. Ct. at 2766-67. Proof of the second and third *Gingles* factors—demonstrating racially polarized bloc voting that enables the white majority usually to defeat the minority's preferred candidate—is circumstantial evidence of racial bias operating through the electoral system to deny minority voters equal access to the political process. Accordingly, the existence of those factors, and a feasible remedy, generally will be sufficient to warrant relief.

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[59] It should be remembered that *Gingles* involved a challenge to a system of at-large multimember legislative districts. Although the preconditions described by the Supreme Court are applicable to vote dilution claims generally, they must be modified to take into account the particular characteristics of the electoral scheme at issue. As we describe *infra* part III, such a modification is necessary in the judicial elections context.

The defendant may rebut the plaintiff's evidence by demonstrating the absence of racial bias in the voting community; for example, by showing that the community's voting patterns can best be explained by other, non-racial circumstances.[60] If the defendant offers such proof, the court must be satisfied, before ruling in favor of the plaintiff, that, under the totality of the circumstances, the minority group is denied meaningful access to the political process "on account of race or color." [61] A violation of section 2 may be established under the "results test" without proof of discriminatory intent in the design or maintenance of the challenged scheme. Nonetheless, we hold that section 2 plaintiffs must demonstrate, through the test's objective factors taken as a whole, that a voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the minority population's voting strength.

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[60] It is important to note that, by demonstrating the absence of racial bias, a defendant is not rebutting the plaintiff's evidence of racial bloc voting. Bloc voting is only one factor (albeit an important factor) in determining whether vote dilution exists under the totality of the circumstances. And, "if the defendant can affirmatively prove, under the totality of the circumstances, that racial bias does not play a major role in the political community, and the plaintiff cannot overcome that proof, then obviously [Congress] did not intend the plaintiff to win, *even if the plaintiff has proven bloc voting.*" *Solomon*, 899 F.2d at 1034 (Tjoflat, C.J., specially concurring).

[61] Here, we are talking about the practical manner in which vote dilution cases should be approached at trial. We do not mean to create a requirement that the defendant present evidence of the lack of racial bias in the voting community as a formal affirmative defense; he or she may always elicit such testimony on cross-examination of the plaintiff's witnesses. The burden of proving vote dilution under the totality of the circumstances remains with the plaintiff, and "there is ... no textual reason to segregate some circumstances from the statutory totality, to be rendered insignificant unless the defendant pleads them by way of affirmative defense." *Johnson v. De Grandy*, U.S. , , 114 S. Ct. 2647, 2662, 129 L. Ed. 2d 775 (1994).

Our reasoning on this point is substantially similar to the approach taken by the Fifth Circuit in *LULAC*, which concerned vote dilution challenges to the election of Texas state trial court judges. In that case, the Fifth Circuit reversed the judgment of the district court (which found section 2 violations in several counties) because the disparate electoral results were principally caused by a factor other than race.[62] Specifically, the court concluded that, "when the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, ... the district court's judgment must be reversed. *LULAC*, 999 F.2d at 850. The *LULAC* court gave the following explanation for the need to examine the reasons for the electoral patterns that statistical evidence reveals:

> Absent evidence that minorities have been excluded from the political process, a "lack of success at the polls" is not sufficient to trigger judicial intervention. Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of "partisan politics" *or* "racial vote dilution," "political defeat" *or* "built-in bias." It is only upon concluding that a minority group's failure to prevail at the polls ... was the "result" or "function" of "racial vote dilution" or "built-in bias," that a court may find that minority plaintiffs have suffered "a denial or abridgement of the right ... to vote on account of race or color."

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[62] Given this holding—that race did not cause the challenged electoral results—it was unnecessary for the *LULAC* court to resolve the issue we address today: whether Congress intended that section 2 liability turn on the existence of racial bias in the community interacting with the challenged electoral scheme to dilute the voting strength of the minority plaintiffs. *See infra* note 63. Nor was it necessary for that court to address the matter of an appropriate remedy.

LULAC, 999 F.2d at 853-54.[63] "Electoral losses that are attributable to partisan politics," the court concluded, "do not implicate the protections of § 2." *Id.* at 863.

It is a difficult task to articulate a standard for vote dilution cases that does not raise insurmountable hurdles for section 2 plaintiffs while at the same time avoiding the equally forbidden result of guaranteeing a right of proportional representation. We submit, however, that the burden allocation detailed above strikes the appropriate balance, such that plaintiffs to make out a case of vote dilution are not required to prove the negative; rather, proof of the second and third *Gingles* factors will ordinarily create a sufficient inference that racial bias is at work.[64] In many cases, "the surest indication of race-

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[63] It should be noted, however, that the Fifth Circuit's decision in *LULAC* rested on narrower reasoning than does ours today. Because the Fifth Circuit held that "plaintiffs, to establish legally significant racial bloc voting, must prove that their failure to elect representatives of their choice cannot be characterized as a 'mere euphemism for political defeat at the polls,' ... or the 'result' of 'partisan politics,' " the court determined that it "need not hold that plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus in thewhite electorate in order to decide that the district court's judgment must be reversed." *LULAC*, 999 F.2d at 859 (citations omitted). Nevertheless, the court did indicate its belief that "such a requirement could be inferred from the text of § 2; the caselaw Congress intended to codify in amending the provision; the Senate Report; the testimony of prominent supporters of the Act; and the controlling opinions of the Supreme Court." *Id.* (citations omitted).

[64] Accordingly, we avoid the Fifth Circuit's concern that "[a] rule conditioning relief under § 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also all other potentially innocent explanations for white voters' rejection of minority-preferred candidates." *LULAC*, 999 F.2d at 859. The defendants would have the obligation to introduce evidence of such innocent explanations; section 2 plaintiffs would be under no obligation to search them out and disprove them preemptively. If the plaintiffs

conscious politics is a pattern of racially polarized voting." *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir.), *cert. denied*, 469 U.S. 976, 105 S. Ct. 375, 83 L. Ed. 2d 311 (1984); *see also United States v. Dallas County Comm'n*, 850 F.2d 1430, 1439 (11th Cir.1988), *cert. denied*, 490U.S. 1030, 109 S. Ct. 1768, 104 L. Ed. 2d 203 (1989). The standard we articulate today simply allows a defendant to rebut proof of vote dilution by showing that losses by minority-preferred candidates are attributable to non-racial causes.

D.

As should be obvious from the foregoing discussion, vote dilution cases are circumstantial evidence cases: Section 2 violations generally will not be established by direct testimonial evidence that resolves the matter at issue. In listing of factors that ordinarily will be most relevant to the section 2 inquiry into the totality of the circumstances, the Senate Judiciary Committee and the *Gingles* Court, like the *White* and *Zimmer* courts before them, attempted to describe the types of evidence that will assist a reviewing court in determining whether the influence of a given racial group has been distorted through the denial of equal access to the political processes. The enumerated objective factors were designed to guide district courts in the receipt of evidence in vote dilution cases by clarifying certain subsidiary inquiries that are relevant to the ultimate issue. The presence or absence of each factor therefore serves as a piece of evidence pointing either towards or away from an ultimate conclusion that an electoral system is or is not operating to dilute a minority group's voting strength on account of race. It is only after making particularized

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have proved the *Gingles* factors, and if the defendants say nothing in response, the plaintiffs ordinarily will have discharged their obligation.

determinations as to these various factors that a district court may weigh its findings in order to as certain whether, in the aggregate, they point to dilution.

Of course, although Congress and the Court expect that the factors listed will be the most relevant in the majority of cases, courts evaluating vote dilution claims should consider all evidence that is probative of the ultimate issue. As *Gingles* emphasizes, section 2 mandates a multifactor circumstantial evidence test for vote dilution such that, despite the Senate Report's express enumeration of typical circumstantial evidence factors, "this list of factors is neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763. Still, in reviewing these factors, we are reminded once more that, although proof of any factor will be helpful to a plaintiff's section 2 claim, it is only the second and third *Gingles* threshold factors (in addition to the first factor, which relates to the availability of a remedy) that must be proven in every case. In particular, before a challenged procedure will violate section 2, "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 49, 106 S. Ct. at 2765-66.

This court has previously recognized the need to consider a wide variety of circumstances when evaluating claims of racial vote dilution under section 2. *Hall v. Holder*, 955 F.2d 1563, 1568 (11th Cir.1992) (quoting *Gingles*, 478 U.S.at 46, 106 S. Ct. at 2764), *rev'd on other grounds*, U.S. , 114 S. Ct.2581, 129 L. Ed. 2d 687 (1994). Therefore, the full totality of the circumstances surrounding a section 2 claim must be considered appropriately when evaluating the *Gingles* preconditions as well as when deciding the ultimate issue of vote dilution:

> If the totality of circumstances could not be considered in reviewing the *Gingles* factors, then courts would often be left to consider statistical and census

> data in an inappropriate contextual vacuum. The interaction of social and historical conditions with the challenged system would not be considered despite the fact that such interactions are central to § 2 claims.

Hall, 955 F.2d at 1568 n. 8. Of course, some Senate Report factors are particularly important because they have a direct bearing on the *Gingles* threshold inquiry while others to the extent that they are relevant, remain "supportive of, but *not essential to*, a minority voter's claim." *Gingles*, 478 U.S. at 48 n. 15, 106 S. Ct. at 2765 n. 15. Although the additional factors need not be present to satisfy the *Gingles* threshold, they must be examined when determining whether, considering all of the circumstances in the case, the plaintiffs are entitled to section 2 relief.

Courts evaluating vote dilution claims, therefore, must consider all relevant evidence; "no single statistic provides courts with a short-cut to determine whether a set of [electoral structures] unlawfully dilutes minority voting strength." [65] *Johnson v. De Grandy*, U.S. , , 114 S. Ct. 2647, 2661-62, 129 L. Ed. 2d 775 (1994). Because the court must conduct a "searching practical

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[65] In *De Grandy*, the Supreme Court confirmed that no single type of evidence is dispositive by rejecting the rule of thumb apparently adopted by the district court: namely, that "anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2, at least where societal discrimination against the minority had occurred and continued to occur." *De Grandy*, U.S. at , 114 S. Ct. at 2659. The Court also declined to introduce proportionality as a safe harbor for any districting scheme because "an inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' " *Id.* at , 114 S. Ct. at 2660 (quoting 42 U.S.C. § 1973(b)). Thus, "the opinion's central teaching is that proportionality—defined as the relationship between the number of majority-minority voting districts and the minority group's share of the relevant population—is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive." *Id.* at , 114S. Ct. at 2664 (O'Connor, J., concurring).

evaluation of the "past and present reality' " of the challenged electoral system in operation, *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764 (quoting S.Rep. No. 417, at 30, *reprinted* in 1982 U.S.C.C.A.N. at 177, 208), the types of evidence that would be relevant under this standard plainly defy categorization. Instead, a court gradually draws together a picture of the challenged electoral scheme and the political process in which it operates by accumulating pieces of circumstantial evidence. Like a Seurat painting, a portrait of the challenged scheme emerges against the background of the voting community. Only by looking at all of the dots on the canvas is a district court able to determine whether vote dilution has occurred.[66] A court should not exclude certain types of relevant evidence—certain colors on the canvas—from its examination if doing so would leave an incomplete view of the circumstantial evidence picture. A piece of evidence is irrelevant only if, after the receipt of that evidence, the existence of a fact appears no more or less probable than it did before that evidence was offered. That is, an item of circumstantial evidence is irrelevant only if it does not allow the trier of fact reasonably to infer anything about whether or not the voting strength of the minority group has been impermissibly diluted.

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[66] The appellants suggest that allowing a fact-intensive inquiry into the presence or absence of racial bias in the voting community "would facilitate the use of thinly-veiled proxies by permitting, for example, evidence that a minority candidate was regarded as 'unqualified' or 'corrupt' to defeat a claim that white voters' refusal to support him was based on race or ethnicity." *LULAC*, 999 F.2d at 860. We trust, however, that district courts will be able to reject such contentions when they are not supported by the evidence. If a defendant contends that racially disparate voting results are best explained by some factor other than race, then that proposition must be proved.

Having articulated the standard that governs vote dilution cases generally, we now turn to the more particular problems involved in evaluating challenges to judicial election schemes.

III.

The principles governing vote dilution claims, including the *Gingles* threshold factors, "cannot be applied mechanically and without regard to the nature of the claim." *De Grandy,* U.S. at , 114 S. Ct. at 2655 (quoting *Voinovich v. Quilter,* U.S. , , 113 S. Ct. 1149, 1157, 122 L.Ed. 2d 500 (1993)). The command that a claim of vote dilution be evaluated with a functional, not a formalistic, view of the political process, *see Gingles,* 478 U.S. at 48 n. 15, 106 S. Ct. at 2765 n. 15, requires that we consider the unique features of judicial elections and the manner in which they affect the vote dilution inquiry. Our analysis focuses on two themes: (1) the need to adjust the factors enunciated in cases involving legislative elections to the judicial context: and (2) the importance of considering the state's interest in the structure of its judiciary. By way of introduction, however, we begin with the Supreme Court's treatment of section 2 challenges to judicial elections.

A.

The Supreme Court considered the application of section 2 to judicial elections in the companion cases of *Chisom v. Roemer,* 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991), and *Houston Lawyers' Ass'n v. Attorney General,* 501 U.S. 419, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991).[67] Essentially, the Court determined that

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[67] In *Clark v. Roemer,* 500 U.S. 646, 111 S. Ct. 2096, 114 L. Ed. 2d 691(1991), the Court held that section 5 of the amended Voting Rights Act (the preclearance provision) also applies to judicial elections.

plaintiffs may bring vote dilution claims under section 2 with respect to the election of state judges, but it left open the issue of what a plaintiff would have to establish to obtain relief.

Chisom involved challenges to the election of two justices of the Louisiana Supreme Court from a multi-member district encompassing the New Orleans area; all of the other justices of the court were elected from single-member districts. *Houston Lawyers' Ass'n* concerned the Texas system for electing trial court judges. Under review in these cases was the Fifth Circuit's en banc decision holding that vote dilution claims in judicial elections are not covered by section 2 because judges are not "representatives" within the meaning of the statute. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 914 F.2d 620, 622-23 (5th Cir.1990) (en banc).

The Supreme Court took pains to stress that its decisions in these cases were limited to the threshold issue of whether section 2 of the Voting Rights Act would allow claims of vote dilution in state judicial elections. In delineating the scope of section 2's coverage, the Court emphasized that it did "not address any question concerning the elements that must be proved to establish a violation of the Act [in this context] or the remedy that might be appropriate to redress a violation if proved." *Chisom*, 501 U.S. at 390, 111 S. Ct. at 2361.The Court simply held that "state judicial elections are included within the ambit of § 2 as amended" and are, therefore, to be analyzed under the established section 2 results test. *Id.* at 404, 111 S. Ct. at 2368. More specifically, the Court explained in *Houston Lawyers' Ass'n* that the Voting Rights Act covers "the election of ... trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are

elected." 501 U.S. at 426, 111 S. Ct. at 2380. The two cases were then remanded for further proceedings.[68]

Although *Chisom* and *Houston Lawyers' Ass'n* do not purport to develop the standard to be applied to the merits in judicial election cases, several passages in the Court's opinions are significant. First, Justice Stevens' majority opinion in *Chisom* explained that the Court's holding that section 2 should be read to cover judicial elections was based on the fact that judicial offices may be akin to representative positions if the state provides for the partisan election of judges, thereby infusing those offices with the characteristics of other elective positions. As the Court noted:

> The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office. When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district.

Chisom, 501 U.S. at 400-01, 111 S. Ct. at 2367 (footnote omitted). In such systems, where judges are thought to be accountable in some sense to the people who elect

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[68] On remand, the Fifth Circuit wrestled with how to apply the *Gingles* threshold test and the subsequent review under the totality of the circumstances to elections of judges. In *League of United Latin American Citizens, Council No. 4434 v. Clements*, 986 F.2d 728 (5th Cir.1993), a panel of the court affirmed the district court's conclusion that the method of electing district court judges in eight Texas counties, but not in a ninth, violated section 2. The panel's decision (with respect to the eight Texas counties) was then reversed by the full court sitting en banc in *LULAC*, 999 F.2d at 877. *Chisom* was ultimately disposed of by a consent judgment. *See Chisom v. Edwards*, 970 F.2d 1408 (5th Cir.1992).

them, the Voting Rights Act should apply to ensure that the judiciary is equally accountable to *all* of the people—in particular, to ensure that the vote of a group of minority citizens is not diluted on account of race. Hence, the Court concluded, vote dilution claims are cognizable with respect to judicial elections.

The Court specifically left open the possibility, however, that a state's judiciary could be excluded from the coverage of section 2 if its judges were not intended to have, and in reality did not have, this representative character. The Court explained that:

> [A state] could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and in that way, it could enable its judges to be indifferent to popular opinion. The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for § 2, as well as § 5, of the Voting Rights Act to continue to apply to its judicial elections.

Id., at 401, 111 S. Ct. at 2367.[60] Essentially, the Court appears to suggest that it is equally wrong to say that section 2 covers all judicial selections as it is to say it covers none. Coverage by the Voting Rights Act, then, turns on the method by which the judges are selected.

Second, the Court indicated in *Chisom* and *Houston Lawyers' Ass'n* that the factors relevant in the totality of the circumstances analysis under section 2 in the legislative context might not be relevant for judicial elections. Emphasizing that "the standard that should be applied in litigation under § 2 is not at issue here," the Court nevertheless predicted that "serious problems [may] lie

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[60] Similarly, the Court concluded in *Houston Lawyers' Ass'n*: "If a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act." 501 U.S. at 426, 111 S. Ct. at 2380.

ahead in applying the 'totality of circumstances' " factors developed in section 2 cases involving legislative elections to the election of judges. *Chisom*, 501 U.S. at 403, 111 S. Ct. at 2368. The difficulty mandating further consideration of the application of vote dilution principles to judicial elections arises from the transformation of a standard developed in the context of one type of election—for representatives in multimember legislative bodies—to a qualitatively different type of election—for state court judges. The Court suggested the following as one modification to the totality of the circumstances inquiry: A state's interest in maintaining the challenged electoral system for its judges is a legitimate factor to be considered when determining liability under section 2. *See Houston Lawyers' Ass'n*, 501 U.S. at 426-27, 111 S. Ct. at 2381 (citing *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir.1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296 (1976)).[70] Such a state interest should also be considered when determining whether the remedy the plaintiff seeks is a feasible alternative to the challenged electoral system. 501 U.S. at 426-27, 111 S. Ct. at 2380-81.

In the instant case, Florida appoints a large percentage of its trial court judges through a merit selection process—but requires judges to compete in nonpartisan retention elections. Thus, the first issue raised in Chisom and Houston Lawyers' Ass'n—whether a non-elected judiciary could escape the ambit of section 2—is not implicated. But the second issue—how the courts' totality of the circumstances analysis must be modified in order to adapt to the judicial model—is before us. In turn, we examine the *Gingles* threshold factors; the other totality of the circumstances factors discussed in *Gingles* and the

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[70] *Zimmer* is a principle source of the totality of the circumstances factors. *See supra* note 35.

Senate Report; and, finally, the Supreme Court's judicially-specific consideration—the state's interest in maintaining its judicial elections structure.

B.

The language of the Court's opinion in *Gingles* suggests that the principles enunciated therein are relevant to claims of vote dilution generally, at least to some degree, and, therefore, their application is not limited to the multimember legislative context. The black voters' in *Gingles* claimed that the North Carolina legislature's decision to employ multimember, rather than single-member, districts for selecting legislators in the contested North Carolina jurisdictions diluted minority votes by submerging them in a white majority, thereby impairing the plaintiffs' ability to elect representatives of their choice. *See Gingles*, 478 U.S. at 46, 106 S. Ct. at 2764. Obviously, the nature of the offices sought—representative positions—shaped the Court's analysis. Nevertheless, the threshold test the Court developed and the accompanying discussion of the totality of the circumstances were not dependent on the representative quality of the offices sought. Rather, they depended on an analysis of section 2, the legislative history behind the 1982 amendment, and the "theoretical basis" for vote dilution: namely, that "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48, 106 S. Ct. at 2765.

The rationale of the *Gingles* decision demonstrates that, if a plaintiff's section 2 claim alleges vote dilution, then the plaintiff must meet *Gingles*' threshold criteria regardless of the nature of the office at stake. As we discuss above, *Gingles* held that plaintiffs in vote dilution cases brought under section 2 must initially establish geographic compactness, minority cohesiveness, and

white bloc voting as preconditions to stating a valid claim. *See id.* at 50-51, 106 S. Ct. at 2766-67. Those three factors are used to evaluate two critical points: (1) the possibility of a remedy and (2) the existence of racially polarized, legally significant racial bloc voting.

1.

The first *Gingles* precondition, informed by the second, dictates that the issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases. As the Supreme Court has explained, "the 'geographically compact [minority]' and 'minority political cohesion' showings [in the *Gingles* threshold test] are needed to establish that the minority has the potential to elect a representative of its own choice from some single-member district." *Growe v. Emison,* U.S. , , 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388 (1993) (citing *Gingles,* 478 U.S. at 50, n. 17, 106 S.Ct. at 2765, n. 17).[71] The inquiries into remedy and liability, therefore, cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system.

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[71] In *Growe,* the Court held that the district court had erred in concluding that a Minnesota state court's legislative redistricting plan, produced as a result of litigation by Minnesota voters, violated section 2 of the Voting Rights Act. Choosing not to apply the *Gingles* preconditions for a vote dilution violation claim because single-member (not multi-member) districts were a tissue, the district court instead proceeded directly to the "totality of circumstances" test in section 2(b) and found unlawful dilution. *Growe,* U.S. at , 113 S. Ct. at 1083. The Supreme Court unanimously reversed, in part, because "the *Gingles* preconditions were not only ignored but were unattainable. As the district court acknowledged, the record simply 'contains no statistical evidence' of minority political cohesion ... or of majority bloc voting in Minneapolis." *Id.* at , 113 S. Ct. at 1085.

The Court in *Growe* explicitly extended the *Gingles* threshold requirements to challenges to single-member district schemes. *See id.*

Implicit in this first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system. Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government; moreover, from a pragmatic standpoint, federal courts simply lack legal standards for choosing among alternatives. Accordingly, we read the first threshold factor of *Gingles* to require that there must be a remedy within the confines of the state's judicial model that does not undermine the administration of justice.

In *Voinovich v. Quilter*,[72] U.S. , 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993), the Court suggested that the first *Gingles* threshold factor means more than the literal ability (and need) to be able to draw single-member districts in legislative vote dilution cases. Indeed, the Court indicated that the particular showing required by that threshold factor must be modified according to the type of claim alleged. *Gingles* itself involved challenges to multimember legislative districts. The *Voinovich* Court noted:

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at , 113 S. Ct. at 1084-85. The Court explained that, in general, multimember districting plans pose a greater threat to minority participation in the electoral process than do single-member districts. Accordingly, "it would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district." *Id.* at , 113 S. Ct. at 1084.

[72] The *Voinovich* plaintiffs challenged the validity of an Ohio reapportionment plan, that allegedly deprived black voters of "influence districts" in which they would have constituted a formidable and influential minority. *Voinovich*, U.S. at , 113 S. Ct. at 1153. The Court declined to decide whether such influence-dilution claims are cognizable under section 2, *id.* at , 113 S. Ct. at 1155, but reversed the judgment of the district court,in part, because the black voters had "failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority

> [T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume arguendo to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority,* but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority.

Voinovich, U.S. at , 113 S. Ct. at 1157 (citation omitted). In *Gingles*, the necessary showing was that the minority group was sufficiently large and geographically compact to constitute a majority in a single-member district; such a showing was logical because the plaintiffs were alleging vote dilution in a system of multimember legislative districts. In judicial cases, however, single-member districts may run counter to the state's judicial model. Thus, the question under the first *Gingles* threshold factor may not be whether the minority group could constitute a majority in a single-member district, but whether, within the state's judicial model, there exists an alternative election scheme that could serve as an appropriate section 2 remedy. *Houston Lawyers' Ass'n,* 501 U.S. at 426, 111 S. Ct. 2380-81.

In *Holder v. Hall,* U.S. , 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994), there was general accord on an otherwise divided Court that plaintiffs in vote dilution cases must

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group's candidate of choice," *id.* at , 113 S. Ct. at 1158. The district court had specifically found that Ohio did not suffer from racially polarized voting.

demonstrate that the challenged system suppressed minority voting strength in comparison to some alternative, feasible benchmark system: "In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." [78] *Id.* at , 114 S. Ct. at 2585 (Kennedy, J.) (footnote omitted); *see also id.* at , 114 S. Ct. at 2589 (O'Connor, J., concurring) (noting "general agreement" that "to determine whether voters possess the potential to elect representatives of choice in the absence of the challenged structure, courts must choose an objectively reasonable alternative practice as a benchmark for the dilution comparison"); *id.* at , 114 S. Ct. at 2621-22 (Blackmun, J., dissenting) (detailing "widespread agreement that minority voters' potential 'in the absence of' the allegedly dilutive mechanism must be measured against the benchmark of an alternative structure or practice that is reasonable and workable under the facts

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[78] As Justice O'Connor explained in *Gingles*:

> "The phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002, 1012, 105 S. Ct. 416, 422, 83 L. Ed. 2d 343 (1984) (Rehnquist, J., dissenting from summary affirmance). Put simply, in order to decide wheth er an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Gingles, 478 U.S. at 88, 106 S. Ct. at 2786. Thus, "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2." *Holder*, U.S. at , 114 S. Ct. at 2586 (Kennedy, J.).

of the specific case" (citation omitted)). That alternative plan, five justices held, cannot alter the size of the governmental body. Furthermore, although not focusing explicitly on the first *Gingles* threshold factor, three justices in the majority based their decision on the fact that there can never be an objective alternative benchmark for comparison where the size of the governmental body is at issue, as was the case in *Holder*.[74]

In short, under *Holder*, federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies. Implicit in this holding, however, is a broader concern. Federal courts may insist that a state or political subdivision operate a governmental structure fairly, thereby allowing all groups equal access to the political process. Courts may require, for example, that black voters are not denied the equal opportunity to elect representatives of their choice for the state legislature. Federal courts may not, however, alter the state's form of government itself when they cannot identify "a principled reason why one

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[74] *See, e.g., Holder,* U.S. at , 114 S. Ct. at 2588 (O'Connor, J., concurring) (describing agreement between herself and Justice Kennedy, in whose opinion Chief Justice Rehnquist joined). Justice Blackmun, writing for the four dissenters, concluded, on the other hand, that "the proposed five-member Bleckley County Commission presents a reasonable, workable benchmark against which to measure the practice of electing a sole commissioner." *Id.* at , 114S. Ct. at 2622 (Blackmun, J., dissenting).

The other two Justices who comprised the majority, Justices Thomas and Scalia, agreed that the size of a governing body cannot be attacked under section 2. They focused not on the practical concerns of locating a benchmark but instead on a novel reading of the statutory text; they would have held that the size of a governing body is not a "standard, practice, or procedure" within the terms of the Voting Rights Act. *Id.* at , 114 S. Ct. at 2591. Justices Thomas and Scalia would overrule all of the Court's precedents holding that vote dilution claims are cognizable under section 2.

[alternative to the model being challenged] should be picked over another as a benchmark for comparison." [75] *Id.* at , 114 S. Ct. at 2586.

Holder also confirms that, from the inception of a section 2 case, the existence of a workable remedy within the confines of the state's system of government is critical to the success of a vote dilution claim. The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability. *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2766. As we note above, a court cannot determine whether the voting strength of a minority group has been impermissibly diluted without having some alternative electoral structure in mind for comparison. Thus, "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged

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[75] Implicit in the *Holder* plurality's conclusion may be the notion that the Voting Rights Act, under our federal system, could not constitutionally authorize federal courts to order the reconstitution of state governmental institutions. It is important to note that "the [Supreme] Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment" and that "the Fourteenth Amendment does not override all principles of federalism." *Gregory v. Ashcroft*, 501 U.S. 452, 469, 111 S. Ct. 2395, 2405, 115 L. Ed. 2d 410 (1991) (upholding Missouri mandatory retirement law for state court judges). Of course, the Civil War Amendments were specifically designed as intrusions on state sovereignty; as a result, the *Gregory* Court articulated a plain statement rule for determining when Congress intends to enforce the Fourteenth Amendment guarantees in contravention of the traditional power of the states.

Justice Kennedy's opinion in *Holder* relies, however, on a construction of the statute, not on constitutional federalism principles. The questions of whether the remedy the appellants ultimately seek (the possibilities of which we discuss infra part V) would be beyond the reach of the Voting Rights Act or foreclosed by the Constitution are not before us. Accordingly, we intimate no view concerning these sensitive issues.

voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2." *Holder*, U.S. at , 114 S. Ct. at 2586.

In the case at hand, the appellees contend that none of the judicial election schemes the appellants propose as a remedy for the alleged abridgement of their right to vote constitutes a feasible solution. Specifically, the appellees submit that each of the alternatives proposed would undermine the administration of justice in the trial courts at issue. We address this argument *infra* part V.

2.

As noted, proof of the second and third *Gingles* preconditions, that the white majority votes sufficiently as a bloc to prevent a cohesive minority group from electing the representatives of its choice, is essential to establishing a section 2 violation. That is, "the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe*, U.S. at , 113 S. Ct. at 1084 (citing *Gingles*, 478 U.S.at 51, 106 S. Ct. at 2766). In *Voinovich*, the Court stressed the importance of these preconditions: "Here, as in *Gingles*, 'in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.' " [76] *Voinovich*, U.S. at , 113 S. Ct. at 1158 (quoting *Gingles*, 478 U.S. at 49 n. 15, 106S. Ct. at 2765 n. 15).

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[76] The Court had explained in *Gingles* that, "in general, a white bloc vote that normally will defeat the combined strength of [cohesive] minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56, 106 S. Ct. at 2769. The level of white bloc voting necessary to minimize or cancel black voters' ability to elect the representatives of their choice necessarily will vary according to local circumstances.

Proof of these *Gingles* threshold factors is central to the ultimate finding of whether minority voters have an equal opportunity to participate in the electoral process and to elect the candidates of their choice. Indeed, "although no factor is indispensable, the legislative history of the amendment to section 2 indicates that racially polarized voting will ordinarily be the keystone of a dilution case." *McMillan v. Escambia County,* 748 F.2d 1037, 1043 (Former 5th Cir.1984); *see also United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (11th Cir.), cert. denied, 469 U.S. 976, 105 S. Ct. 375, 83 L. Ed. 2d 311 (1984). Racial bloc voting is, therefore, the essence of a vote dilution claim because, to be actionable, the electoral defeat at issue must come at the hands of a cohesive white majority.

3.

The Court's cases applying the *Gingles* threshold test reveal two basic principles that we have been discussing: first, that the possibility of an acceptable remedy is essential to a successful section 2 vote dilution claim; and, second, that, as the *Gingles* opinion itself makes clear, a minority group cannot prove that it has less opportunity than other members of the voting community to elect representatives of its choice without demonstrating the existence of significant white bloc voting. Absent such a showing, there can be no section 2 relief because, "unless these points are established, there neither has been a wrong nor can [there] be a remedy." *Growe,* U.S. at , 113 S. Ct.at 1084. These requirements are equally applicable to judicial, legislative, and executive branch cases. With that in mind, we now consider the application of the circumstantial evidence factors referred to in *Gingles*, and in the Senate Report accompanying the 1982 amendment to the Voting Rights Act, to vote dilution claims challenging the merits of electing state trial court judges. *Gingles*, 478 U.S. at 36-37, 106 S.

Ct. at 2752; S.Rep. No. 417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 177, 206-207.

The statutory touchstone of a vote dilution claim is whether the members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The circumstantial evidence factors summarized in *Gingles* ordinarily support an inference of vote dilution under section 2. These factors were designed as objective indicia that ordinarily would show whether the voting community as a whole is driven by racial bias as well as whether the contested electoral scheme allows that bias to dilute the minority group's voting strength. The Supreme Court consistently has emphasized, however, that these factors were enumerated *solely* to assist courts in evaluating vote dilution claims; their application is not legally required for any other reason. Thus, some of the factors relevant to a vote dilution claim in the legislative context may not be helpful in the context of judicial elections; conversely, circumstances that have been traditionally excluded from the list of legislative factors might be highly probative to claims of vote dilution in state trial court elections.

Obviously, there are significant differences between the legislative and judicial arenas, chief among them being the varied expectations of responsiveness and bias in favor of constituents. An examination of the circumstantial evidence factors listed by the *Gingles* Court reveals that several of these factors are either inapplicable, or at most only marginally applicable, in the context of Florida's system of trial court elections.

Legislators are generally viewed as advocates, or "representatives" in the conventional sense of the word, of their constituents. Their loyalties lie, first and foremost, with the people in their districts. In a collegial legislative body, representatives compromise in order to

satisfy both the needs of the voters back home and the competing goals of various groups. Accordingly, one of the totality of the circumstances factors listed in the Senate Report and in *Gingles* concerned " 'whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.' " *Gingles*, 478 U.S. at 37, 106 S. Ct. at 2759 (quoting S.Rep.No. 417, at 28-29, reprinted in 1982 U.S.C.C.A.N. at 177, 206-07). As the *Gingles* Court indicated, "not only does 'voting along racial lines' deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences.' " *Id.* at 48 n. 14, 106 S. Ct. at 2765 n. 14 (quoting *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S. Ct. 3272, 3279, 73 L. Ed. 2d 1012 (1982)). This is because "public officials need not address concerns expressed by minorities so long as white bloc voting ensures that they will remain *minority* concerns." *LULAC*, 999 F.2d at 858. The statement implicit in *Gingles* and other legislative voting rights cases is that black voters need an advocate for their race in the legislative process and that, by diluting the voting strength of the black community, an electoral scheme may deny them such a representative.

Trial court judges, on the other hand, are neither elected to be responsive to their constituents nor expected to pursue an agenda on behalf of a particular group.[77]

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[77] The judicial election schemes challenged in the instant case minimize the potential for a trial judge to pursue an agenda on behalf of a particular group of constituents by "linking" the territory over which the judge's court exercises jurisdiction and the judge's electoral base. The subdistricting remedy the appellants propose would reduce the size of the judge's electoral base (while maintaining the size of the judge's territorial jurisdiction) and thus increase the potential for responsiveness to special interest groups in the constituency. The policy underpinning the linkage provided by the challenged schemes

Engaging in legislative-style "logrolling" and negotiating would be reprehensible conduct in a judge and would violate the core principles governing the judicial role.[78] The factor calling for an evaluation of whether the elected officials are addressing the "particularized needs of the members of the minority group" is, therefore, inappropriate in the judicial context.[79]

The unique nature of judicial elections has other implications as well. The *Gingles* Court and the Senate Report, for example, suggest that whether political campaigns have been characterized by overt or subtle racial appeals is a relevant factor for courts to consider in the totality of the circumstances. Given the nonpartisan, low-profile nature of many judicial races, however, this factor seems far less probative in judicial elections than

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is a factor to be taken into account in deciding whether, under the totality of the circumstances analysis, the appellants have presented a case of vote dilution. *Houston Lawyers' Ass'n*, 501 U.S. at 426, 111 S. Ct. at 2380-81; *Gingles*, 478 U.S. at 37, 106 S. Ct. at 2759 (citing S.Rep. No. 417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 177, 206-07). We take this policy into account *infra* part IV.D. That policy also plays a role in our determination, *infra* part V, whether the relief the appellants seek is feasible.

[78] This case concerns the election of trial court judges, not the members of a multimember appellate court. Traditional legislative-style "logrolling" would not be appropriate even on a court that decides cases as a group, but there might be more to be said for some form of "representation" on a collegial court (like a state supreme court) than on a single-judge trial court. The ability to bring diverse perspectives to the court, not the prospect of outright dealmaking, would be relevant in such a context.

[79] As the Fifth Circuit has noted when considering a vote dilution challenge to the election of trial court judges in Texas, "the irony, of course, is that the subdistricting remedy sought by plaintiffs provides most judges with the same opportunity to ignore minority voters' interests without fear of political reprisal they would possess if elections were in fact dominated by racial bloc voting." *LULAC*, 999 F.2d at 859. We discuss this issue in greater detail *infra* part V.

in legislative or executive contests. If there is no campaign in general, the corresponding absence of racial appeals is of minimal value in determining whether the voting strength of minority voters is being diluted.

Because of the low-profile nature of judicial races, the effects of incumbency and success in the appointment process tend to be more probative in judicial elections than in the legislative context; these differences must be considered by courts evaluating section 2 claims such as the one before us. The record in this case indicates that most judicial incumbents run for reelection unopposed, the importance of which was highlighted by numerous witnesses at trial.

In *Gingles*, the Court touched briefly on the issue of incumbency, recognizing it as one of the "special circumstances" that could explain a deviation from a pattern of racially polarized voting. The Court explained:

> [I]n a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.

Gingles, 478 U.S. at 57, 106 S. Ct. at 2770 (emphasizing in an accompanying footnote that "this list of special circumstances is illustrative, not exclusive"). Some courts, including the panel in this case, have "interpreted *Gingles* to permit consideration of special circumstances only to explain variations from a usual pattern of racially polarized voting"; that is, they suggest, while

"special circumstances may explain minority electoral success in a polarized election ..., the converse is not also true." [80] *Nipper v. Smith*, 1 F.3d 1171, 1181 (11th Cir.1993). Given that incumbency is often the determining factor in judicial elections, we conclude that the effect of incumbency should play a crucial role in the vote dilution inquiry in judicial election cases. In addition to its effect on the probative value of statistics concerning the polarized voting inquiry, the significance of incumbency likewise merits its placement on the list of relevant factors to be considered when making the ultimate determination of section 2 liability under the totality of the circumstances.

Florida's institution of a modified "Missouri Plan," combining merit appointment with contested nonpartisan elections, for the selection of its trial court judges is also highly relevant in the vote dilution inquiry. Two of the legislative-based circumstantial evidence factors touch on this area: *Gingles* and the Senate Report note that whether members of the minority group have been denied access to a candidate slating process may be considered in the totality of the circumstances, as may " 'the extent to which members of the minority group have been elected to public office in the jurisdiction.' " *Gingles*, 478 U.S. at 36-37, 106 S. Ct. at 2759 (quoting S.Rep. No. 417, at 28-29, *reprinted* in 1982 U.S.C.C.A.N. at 177, 206-07). The operation of the judicial appointment process is the correlative factor in this case. Where a large number of trial court judges first reach the bench through the appointment process and many of them are

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[80] *See also Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1329-30 (N.D.Ill. 1989) ("The 'special circumstances' the [*Gingles*] Court had in mind were circumstances that would explain the minority's candidates winning the election in spite of white bloc voting. Plaintiffs' argument turns the Court's language on its head and would have it refer to circumstances explaining the *defeat* of the minority's candidate....").

subsequently reelected unopposed, the effect of appointment is particularly pronounced. If incumbents who originally gained office through a process of merit selection win consistently, a strong inference arises that qualifications are significant to the electorate and that voters generally place confidence in the nominating commission process. A functional and realistic view of the political process for selecting state court judges therefore must include an examination of the appointment process; correspondingly, the access to the bench that it provides to black judicial applicants cannot be ignored.[81]

In sum, the factors to be considered in the totality of the circumstances must be modified to account for the unique features surrounding judicial elections. Although we have given some examples of the modulations that courts must undertake in tailoring their inquiries to the nature of the vote dilution claims before them, we by no

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[81] In *Stallings*, a case challenging the single county commissioner form of government in Carroll County, Georgia, this court discounted evidence that black citizens had been appointed to various county boards and commissions because, despite the numerous appointments cited by the defendants, "no black had ever been *elected* to *any* county office in Carroll County." *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1560 (11th Cir.1987), *cert. denied*, 485 U.S. 936, 108 S. Ct. 1111, 99 L. Ed. 2d 272 (1988). As the court explained, "while appointments to boards and commissions may be evidence of the willingness of some whites to allow some black participation in the political process, it does not demonstrate the ability of blacks to get elected to political office in Carroll County." *Id.*

The principle enunciated in *Stallings* will hold true in many cases. Where, however, the appointment process is not a seldom-used aberration but the principal method by which public officials first reach office (as may be the case for trial court judges in Florida), minority success in the appointment process becomes a far more important and relevant factor to be considered. Moreover, the appointments at issue in *Stallings* were for exogenous county offices, not the county commissioner positions that were the subject of that litigation.

means intend this discussion to be exhaustive. Following our painting analogy, the palette of circumstantial evidence to beused in judicial elections may differ from that used in the legislative context; courts must be cognizant of this reality throughout the process. Nonetheless, the act of painting an accurate portrait of the electoral process remains the same: A court should not escape the mechanistic application of the established Senate Report and *Gingles* factors only to substitute another, equally rigid, setof considerations merely because it is tailored more precisely to the judicial context. Each court, in determining whether the circumstantial evidence points to the dilution of minority voters' electoral opportunities, must continue to take all relevant evidence into account.

IV.

With the foregoing principles in mind, we now examine the district court's disposition of this case. First, we examine the record to determine whether, contrary to the district court's conclusion, the appellants' evidence satisfies *Gingles'* second and third threshold factors: racially polarized voting that enables the white majority usually to defeat the cohesive minority's candidate of choice. We conclude that the appellants' evidence satisfies these factors. Second, having reached this conclusion, we determine whether the appellees have rebutted this evidence, so that under the totality of the circumstances the appellants failed to prove a case of vote dilution.[82]

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[82] The determination of vote dilution under the totality of the circumstances in a section 2 case is subject to review under the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure, as are the subsidiary factual findings made by the district court in reaching its ultimate conclusion. *Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781. At the same time, however, "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including

In considering the appellants' evidence of racially polarized voting, and the relative weight it should be given, the district court took a rigid, formulaic approach. Instead of undertaking the type of practical, searching inquiry the Supreme Court requires in vote dilution cases, the district court only counted judicial elections in the Fourth Circuit and in Duval County and erroneously discounted several of them as not relevant. The court then ruled that the appellants had failed to meet their *Gingles* threshold burden of proving racial bloc voting because the percentage of elections lost by black candidates of choice did not demonstrate that black candidates of choice are "usually" defeated by the cohesive white majority. *Nipper*, 795 F. Supp. at 1548.

In its dispositive opinion, the district court acknowledged that the statistics concerning the six Fourth Circuit and Duval County Court elections since 1972 that involved black candidates "would ordinarily make out a sufficient showing of racial polarization in these six judicial elections." *Id.* at 1540. Indeed, the figures for those elections show greater polarization by race in voting patterns than the elections analyzed in both *Gingles*, 478 U.S. at 80-82, 106 S. Ct. at 2781-83, and *Solomon v. Liberty County*, 899 F.2d 1012, 1021 (11th Cir.1990) (en banc) (Kravitch, J., specially concurring) (wherein all ten judges of the en banc court agreed that racially polarized voting had been established as a matter of law), *cert. denied*, 498 U.S. 1023, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991). The district court's effort to whittle down this seemingly conclusive evidence by deeming certain elections not relevant demonstrates the problem with a mechanistic approach to vote dilution

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those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' " *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 104 S. Ct. 1949, 1960, 80 L. Ed. 2d 502 (1984)); *see also Stallings*, 829 F.2d at 1554.

cases. When the evidence in this case is examined and weighed, not merely compiled and totaled, the picture that emerges is quite different from the one painted by the broad brush strokes of the district court. Indeed, a more nuanced view of the record reveals the existence of legally significant racially polarized voting and, therefore, vote dilution.

A.

The district court first discounted the probative value of the six circuit and county court elections by suggesting that they were "stale." Indeed, as we discuss supra part I, the two most recent elections occurred in 1984 while the other four took place more than fifteen years ago. See *Nipper v. Chiles*, 795 F. Supp. 1525, 1540 (M.D.Fla.1992). Although staleness may become a factor when the nature of the electorate or the office at stake has changed significantly during the intervening period,[83] the mere fact that the analyzed elections were somewhat dated has not prevented this court from finding racial vote dilution in a number of our section 2 cases.[84] In *Solomon*, for example, all members of this court agreed in 1990 that the existence of polarized voting had been established as a matter of law on the basis of six elections that involved black candidates seeking county offices and that were held between 1968 and 1984.

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[83] The radical changes made in the system of electing judges in Florida, *see supra* part I.B., presumably account for the decision of the experts in this case to begin their analyses with the 1972 elections. The implication is that elections that took place under the former system were sufficiently different so as to shed little light on whether the current scheme is diluting the voting strength of the minority group.

[84] To require plaintiffs in vote dilution cases to show recent electoral defeats of black candidates would be to penalize black candidates for not running in the face of long odds. Moreover, testimony ad-

The six elections in which black candidates ran for seats on either the Fourth Circuit or the Duval County Court should not have been discounted because there was no evidence that those elections were unrepresentative of conditions prevailing under the current electoral scheme. There have been no significant structural changes in the system used to elect circuit and county court judges in Florida in the past twenty years, and the electorate in the Fourth Circuit and Duval County has not changed in character since the elections in question took place.

B.

In addition to minimizing the significance of all of the circuit and county court elections involving black candidates, the district court improperly discounted the probative value of two of these elections by pointing to what it termed "special circumstances." In two of the six judicial elections in which black candidates participated (the 1978 election for circuit judge involving Harrell Buggs and the 1984 election for county judge involving Denise Prescod), the black candidate challenged an incumbent judge. According to the district court, "given the undeniable power of incumbency in judicial elections, the probative value of these two elections is significantly diminished on the issue of racial polarization." *Nipper*, 795 F. Supp. at 1542. The court further explained its decision on this point as follows:

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duced at trial suggested a reason for the reluctance of black candidates to seek judicial office in the Fourth Circuit and in Duval County: the futility of running in the face of pervasive racial bloc voting and the history of black electoral defeat in circuit wide and county wide at-large races. *Cf. Gingles*, 478 U.S. at 57 n. 25, 106 S. Ct. at 2770 n. 25 ("Where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim."); *Solomon*, 899 F.2d at 1021 (Kravitch, J., specially concurring) (noting that "not a single black has ever been elected in Liberty County" and suggesting that "six futile elections is enough").

> In *Gingles*, the Supreme Court stated that minority electoral success does not foreclose a vote dilution claim if that success can be explained by special circumstances, such as the minority candidate running unopposed, or the fact that the minority candidate ran as an incumbent. *See Gingles*, 478 U.S. at 57, 106 S. Ct. at 2770. The converse of this proposition must also be true. That is, any balanced consideration of a vote dilution claim should also take into account any special circumstances that may explain minority electoral failure in a polarized contest. In particular, the same special circumstances identified by the *Gingles* Court to explain minority success—incumbency and the absence of an opponent—should be considered in analyzing elections in which minority candidates have been defeated.

Id. Thus, the district court concluded that the Buggs and Prescod elections were "better viewed as evidence of the power of incumbency rather than as strong evidence of racial polarization." *Id.* Moreover, because Leander Shaw actually "won" the 1972 circuit judge primary by finishing first and advancing to the runoff, the court concluded that "in only three of the six judicial elections for circuit and county judge did white bloc voting operate to defeat the black candidate in the absence of special circumstances." *Id.*

Incumbency, as we have noted, often will be the determining factor in judicial elections and therefore serves as an important factor to be considered in judicial vote dilution cases. The presence or absence of incumbents in particular races may go a long way toward explaining the pattern of election results presented, thereby aiding in the resolution of the fundamental question of whether the voting community is driven by racial bias that is operating through the challenged at-large election system to dilute the voting strength of

minority voters. Yet, even if incumbency often is a determining factor in judicial elections, it nonetheless remains only one factor to be considered. The badge of office should not be viewed as a talisman by courts, sufficient in and of itself to deem an election involving an incumbent irrelevant to a plaintiff's vote dilution claim.

Moreover, the record in this case reveals that the candidacies of the white incumbents against whom Buggs and Prescod ran were surrounded by "special circumstances" of their own. Buggs' opponent had been in office only approximately one hundred days while Prescod's opponent was not a lawyer and had received the worst ratings in the bar polls of any judge in the circuit.[85] Thus, although it was relevant that the black candidates in these elections ran against incumbents, the fact that the white opponents were anything but established, strong incumbents was equally worthy of judicial consideration.

C.

Because it believed that the "stale" nature of the six judicial elections involving black candidates reduced their probative value, the district court felt obliged to examine all elections for circuit and county judge from 1972 to 1990, regardless of whether a black candidate participated.[86] In examining that broader group of contests, the court found that the candidate of choice of black voters won sixty-eight percent of the circuit court elections and fifty-eight percent of the county court

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[85] Of course, Prescod herself lacked significant legal experience, having run for county court judge just two years after being admitted to the bar.

[86] The district court failed to explain why many of these elections would not be as stale and lacking in probative value as those involving black candidates that it had already discounted.

races. "Clearly," the court concluded, "when all elections for circuit and county judge from 1972 to 1990 are considered, Plaintiffs have failed to prove that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate." *Nipper*, 795 F. Supp. at 1540.

The district court's use of elections involving only white candidates to reject the appellants' allegations of racially polarized voting derived from the comment by the *Gingles* plurality that "the race of the candidate per se is irrelevant to racial bloc voting analysis." *Id.* at 1541 (quoting *Gingles*, 478 U.S. at 67, 106 S. Ct. at 2775). That statement, however, cannot be relied on for the proposition suggested by the district court. As the Fifth Circuit has held, "*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir.1987), *cert. denied*, 492 U.S. 905, 109 S. Ct.3213, 106 L. Ed. 2d 564 (1989); *see also Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213, 106 L.Ed. 2d 564 (1989). Therefore, that court has stressed that "the evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates." *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1208 n. 7 (5th Cir.1989); *see also LULAC*, 999 F.2d at 864 ("This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates, generally on grounds that such elections do not provide minority voters with the choice of a minority candidate."). As we have explained, "it is the access of minority voters to the political process, not the majori-

ty's access to the black vote, which is the chief concern of Section 2 of the Voting Rights Act." *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1559 (11th Cir.1987), *cert. denied*, 485 U.S. 936, 108 S. Ct. 1111, 99 L. Ed. 2d 272 (1988).

It is logical, as the Fifth Circuit suggests, that the most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving black candidates. Certainly, where only white candidates are competing for office in a particular jurisdiction, it is "virtually unavoidable that certain white candidates would be supported by a large percentage of ... black voters." *Citizens for a Better Gretna*, 834 F.2d at 502. Such elections, however, may reveal little about the issue to be determined: the capacityfor white bloc voting usually to defeat black candidates of choice. Particularly where voting is extremely polarized by race in elections in which black candidates participate, white-on-white elections in which a small majority (or a plurality) of black voters prefer the winning candidate seem comparatively less important.

In holding as we do, however, we do not foreclose the consideration of electoral races involving only white candidates where the record indicates that one of the candidates was strongly preferred by black voters. Under such circumstances, the preference of the black electorate might be proved through the use of anecdotal testimonial evidence, polling data, a review of the appeals made during the campaign, and turnout information,[87] indicating whether black voters were energized to support a particular white candidate. As the Supreme Court has explained:

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[87] In its opinion, the district court noted that "no comprehensive evidence on black and white voter turnout was presented to the Court" at trial. *Nipper*, 795 F. Supp. at 1544 n. 23. Accordingly, the court's only findings were that black voters "have had no problems

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Johnson v. De Grandy, U.S. , 114 S. Ct. 2647, 2661, 129 L. Ed. 2d 775 (1994). Where black voters have a genuine candidate of choice in an election involving only white candidates, then the results will be relevant to the question of whether racial bloc voting enables the white majority usually to defeat the minority's preferred candidate. The district court suggested that it had found such elections, but it did so based only on a cursory examination of the circumstances surrounding the elections in question.

In any event, the conclusion that the candidate of choice of black voters won a majority of the white-on-

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registering, voting, or participating in judicial elections," and that "while there does appear to be a higher 'rolloff' effect in judicial elections for blacks than whites, there is no evidence that this 'rolloff' effect is attributable in any way to Florida's history of discrimination." *Id.* at 1544. The "rolloff" effect refers to the behavior of voters who sign in at the polls but fail to cast a vote for a particular contest on the ballot; it is generally more pronounced for the low-profile contests, such as judicial elections, that are typically printed near the bottom of the ballot.

white judicial elections at issue in this case partially misconstrues the evidence in the record. In the great majority of those elections, the candidate of choice of black voters was also the preferred candidate of the white voters, thus making those elections of relatively little use in evaluating the power of white bloc voting. Only nineteen of the white-on-white elections appear particularly probative—those in which the candidate of choice of black voters differed from the candidate of choice of white voters. In those nineteen "split preference" elections, as identified by Dr. Lichtman, the black voters' preferred candidate lost eighty-four percent of the time.[88] The district court's attempt to minimize the evidence of racial polarization in the electorate in general, and of the strength of white bloc voting in particular, was misguided; the evidence clearly established that, even in the white-on-white judicial campaigns at issue here, racial bloc voting played a role in judicial elections in the Fourth Circuit and in Duval County.

D.

As our previous discussion clearly demonstrates, the record reveals that sufficient racial bloc voting exists in Fourth Circuit and Duval County Court elections, such that the white majority usually defeats the minority's candidate of choice. In short, the evidence the appellants presented creates a strong inference of racial vote dilution. The district court assumed that this might be

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[88] Because of this pattern, Dr. Weber, one of the appellees' experts, admitted that he would not rely on the results of the white-on-white elections in advising a potential black candidate of his chances to be elected to the Fourth Circuit or the Duval County Court even if he or she were the overwhelming candidate of choice of black voters. Those results, he acknowledged, do not indicate a likelihood of success because the evidence shows that the electoral dynamic is fundamentally different when there is a black candidate in the race.

the case and, therefore, addressed the question of whether the appellees adduced evidence sufficient to rebut, under the totality of the circumstances, that inference of vote dilution. *Nipper*, 795 F. Supp. at 1543. The court concluded that the appellees had done so; they "offered overwhelming proof of objective factors in rebuttal that demonstrate ... that the social conditions in the Fourth Judicial Circuit and Duval County are such that their interactions with the electoral scheme do not, and will not, result in voting discrimination in the judicial elections under challenge." *Id.* at 1548. In reaching this conclusion, however, the district court did not explain how, if at all, the appellees' proof rebutted the appellants' evidence of racial bloc voting and the substantial inference of vote dilution that evidence yields. Rather, the court appears to have found for the appellees because justice in the Fourth Circuit and Duval County courts is being administered fairly and impartially by judges who are "responsive to the needs of all citizens." *Id.* Moreover, in the court's view, "there are legitimate state interests in maintaining the current [electoral] system" which preclude a finding of section 2 liability. *Id.*

The finding that justice is being administered fairly and impartially begs the question of whether the racial bias existing in the voting community is interacting with the challenged electoral systems to dilute the minority's voting strength. We think this is self-evident. Florida's interest in maintaining the current electoral systems in the Fourth Circuit and Duval County, however, should be taken into account in determining whether, under the totality of the circumstances, the appellees have violated section 2. As the Supreme Court stated in *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419, 426, 111 S. Ct. 2376, 2381, 115 L. Ed. 2d 379 (1991), "the State's interest in maintaining an electoral system ... is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred."

The state's interest in the case at hand, which is the same interest as the one involved in *Houston Lawyers' Ass'n*, is "in maintaining a link between at trial judge's jurisdiction and the judge's elective base." *Nipper*, 795 F. Supp. at 1547. Accepting the appellees' argument on the point, the district court found "that [this linkage] serves to foster judicial independence, or at least the appearance of judicial independence. In a system of single-member subdistricts, [one of the alternative remedies the appellants were seeking,] there would be some pressure on elected judges to respond to specific electoral constituents when one of their constituents is involved in litigation against a nonresident of that subdistrict. The at-large system eliminates this pressure by linking the judge's jurisdiction and elective base." *Id.*

The question facing the district court was the precise role the linkage interest, as a piece of circumstantial evidence, plays in the totality of the circumstances analysis. The district court was unable to answer this question because precedent, especially our divided en banc opinion in *Solomon*, had not established what the totality of the circumstances was supposed to demonstrate. We answer the question today, holding that the totality of the circumstances must indicate whether racial bias exists in the voting community and is interacting with the challenged electoral system to dilute the plaintiff minority's voting power.

The State's linkage interest is of little, if any, relevance in this inquiry. First, the linkage interest neither establishes nor rebuts the existence of racial bias in the voting community; rather, with one exception, the interest constitutes a neutral factor in the totality of the circumstances. Racial concerns did not inform the creation of Florida's judicial circuits or its counties; nor did race play a role in the State's decision to link the judges' territorial jurisdiction and electoral base and to require the judges to reside within their jurisdictions. Similarly,

racial concerns did not prompt the several judicial reforms that have taken place over the past twenty-four years. In the main, those reforms were adopted to remove the judiciary from the evils of party politics, to enhance the independence of the judiciary, and to improve the overall quality of the bench.

The one exception to the linkage interest's neutrality as a relevant circumstance lies in the State's decision to employ the commission feature of the Missouri plan in filling mid-term vacancies on its courts. As our discussion, *supra* part I, indicates, the use of this feature has enhanced minority access to the bench and, coupled with the incumbency benefit that flows from merit selection, has ensured the retention in office of minority appointees. An inference can be drawn from this that the State, in partially adopting the Missouri plan for its trial courts, is attempting to negate the influence of racial bias in the *selection* of some trial court judges. This mayor may not, however, enhance the ability of minorities to *elect* candidates of their choice. In sum, we conclude that the state's linkage interest does not rebut the appellants' evidence that racial bloc voting exists in the Fourth Circuit and Duval County in such a way that the white majority usually defeats the minority's candidate of choice.[89]

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[89] It should come as no surprise that the State's linkage interest has little, if any, probative value in resolving the question of whether racial bias in the voting community is diluting the plaintiff minority's voting power. Other courts, in determining whether the "results test" of § 2 has been met, have found the state policies underlying the challenged electoral processes to be relevant, but of marginal importance, in the totality of the circumstances analysis. *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir.) (viewing state policy as a "relevant" but "less important" factor under the results test), *cert. denied*, 469 U.S. 976, 105 S. Ct. 375, 83 L. Ed.2d 311 (1984); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir.1984)(recognizing the "diminished importance" of the state policy factor).

V.

Although the State's interest in linking the jurisdictional and electoral bases of its circuit and county court judges has minimal relevance in the totality of the circumstances analysis in this case, that interest plays a major role in our consideration of the remedies the appellants propose as alternatives to the challenged electoral schemes. *Holder v. Hall*, U.S. , , 114 S. Ct. 2581, 2587-88, 129 L. Ed. 2d 687 (1994); *Houston Lawyers' Ass'n*, 501 U.S. at 426, 111 S. Ct. at 2380-81. Accordingly, we address each of these alternative remedies, considering each against the backdrop of the policies that linkage advances. We conclude that none of the alternatives constitutes an objectively reasonable and workable solution to the vote dilution present in this case.[90]

A.

1.

One remedial option is the creation of electoral subdistricts within the territorial jurisdiction of the trial courts at issue. A model of single-member districts would call

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[90] The district court, having found no vote dilution, did not undertake this inquiry. The court did find that the appellants had satisfied the first *Gingles* threshold factor (which addresses the matter of remedy), but in so doing the court focused solely on whether an electoral subdistrict (with a black majority sufficient to elect a candidate of choice) could be drawn geographically. The court, however, did not equate the first *Gingles* factor with the feasibility of a remedy (as we do in this opinion); instead, it apparently read *Gingles* to mean that a remedy is available in any § 2 case if a district with sufficient minority voters to elect a candidate of choice can be drawn.

Nor did the panel, in remanding the case for the imposition of a remedy, undertake this inquiry. *Nipper*, 1 F.3d at 1184. The panel apparently assumed *sub silentio* that a remedy of subdistricts could be fashioned without adversely effecting the administration of justice in the Fourth Circuit and in Duval County.

for one judge to be elected from each of twenty-eight circuit court and twelve county court subdistricts. An alternative would be to carve two or more broader multimember subdistricts out of the existing Fourth Circuit and Duval County territories. This alternative [91] appears to be the remedy the appellants preferred in the district court. *Nipper*, 795 F. Supp. at 1539.

The maintenance of the linkage between a trial court judge's territorial jurisdiction and electoral base serves to preserve judicial accountability. Florida's current model of trial court elections embodies a state judgment that the voters in a judge's jurisdiction should have the right to hold that judge accountable for his or her performance in office. Subdistricting, however, would disenfranchise every voter residing beyond a judge's subdistrict, thus rendering the judge accountable only to the voters in his or her subdistrict. Moreover, even in the judge's subdistrict, a group of voters would effectively be disenfranchised: In the white subdistrict, the voting power of blacks would be diluted to a degree greater than the dilution presently existing; in the black subdistrict, the voting power of whites would be diluted. The Fifth Circuit discussed some of the negative effects this arrangement would have on minority voters:

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[91] In addressing this proposed remedy, the district court observed as follows:

> Plaintiffs presented expert testimony which indicated that a subdistrict containing a 60.09% black voting age population can be created within the Fourth Judicial Circuit and Duval County.... Plaintiffs have demonstrated that blacks are a sufficiently large and geographically compact group to constitute a majority in a subdistrict.

Nipper, 795 F. Supp. at 1539. The proposed subdistrict could be drawn in the northwest quadrant of Duval County with sufficient black population to elect six of the twenty-eight circuit court judges and three of the twelve county court judges. *Nipper*, 1 F.3d at 1175.

> After subdistricting, a handful of judges would be elected from subdistricts with a majority of minority voters. Creating "safe" districts would leave all but a few subdistricts stripped of nearly all minority members. The great majority of judges would be elected entirely by white voters. Minority litigants would not necessarily have their cases assigned to one of the few judges elected by minority voters. Rather, the overwhelming probability would be that the minority litigant would appear "before a judge who has little direct political interest in being responsive to minority concerns."

LULAC, 999 F.2d at 873 (citation omitted). Although the effect of such a loss of minority influence has been debated in the legislative context, *see, e.g., DeGrandy*, U.S. at , 114 S. Ct. at 2654-55; *Solomon*, 899 F.2d at 1038 (Hill, J., concurring), the concern is more pronounced here because trial court judges act alone in exercising their power. In the case of collegial bodies, all citizens continue to elect at least one person involved in the decision making process and are, therefore, guaranteed a voice in most decisions. In the case of trial court judges, who conduct their decisionmaking process independently, subdistricting would eliminate the minority voters' electoral influence over the majority of the judges on both the Fourth Circuit and Duval County courts.

The record in this case is devoid of evidence that justice in those courts is currently being administered in a racially discriminatory manner. On the contrary, the witnesses at trial unanimously asserted that the judges were dispensing fair and impartial justice, without regard to the race of the litigants.

Against this backdrop, the announced purpose of a court-imposed subdistricting scheme would be to assist a predominantly black section of the circuit or county in electing black judges. We believe that the effect of

having black judges accountable primarily to the black section of their district, due to the creation of subdistricts, and white judges answerable primarily to the white section of their district, would be detrimental to this pattern of fair and impartial justice. Thus, in a districting scheme, the race of the constituents would become the deciding factor in determining over which judges the constituents would exercise their oversight function.

In linking the size of judicial electoral districts to the court's territorial jurisdiction, Florida also has attempted to balance the desire for accountability of trial court judges to their electorate with the need to preserve judicial independence. Breaking this link by creating smaller electoral districts along racial lines would override the State's judgment concerning the appropriate size of trial court electorates and would foster the idea that judges should be responsive to constituents, thereby reversing Florida's trend towards deemphasizing "representation" by judges and consequently undermining the ideal of an independent-minded judiciary.

As we have observed, the legislature and electorate of the State of Florida have been moving steadily away from partisan judicial elections and towards the merit selection and resulting independence of the judiciary. Notwithstanding our consideration, as *Gingles* commands, that Florida has a history of racial discrimination and a judiciary elected in raw partisan politics, Florida has emphatically abandoned that past. Yet any districting remedy imposed by the district court would, by its very nature, alter this course and encourage greater "responsiveness" of judges to the special interests of the people who elected them. Such a remedy would reintroduce the very vices from which the state and its citizens have sought to insulate the judiciary.

Abandoning linkage through the creation of subdistricts would impair the operation of the partial "Missouri

Plan" that Florida employs in selecting trial court judges. Because Florida requires its trial court judges to reside in the jurisdiction from which they are elected, subdistricting would limit the breadth of applications to the circuit and county nominating commissions. Even if the requirement that judges live in their subdistrict were eliminated, given the racial composition of the subdistricts, black attorneys would be reluctant to stand for office in white subdistricts and white attorneys would be reluctant to stand for office in black subdistricts. This would frustrate the nominating commission's efforts to discharge its statutory duty to present to the governor for circuit court appointment nominees who "reflect ...the racial and ethnic diversity of the population within the circuit." 1994 Fla.Sess.Law Serv. ch. 94-137, § 1.

The implementation of subdistricts would increase the potential for "homecooking" by creating a smaller electorate and thereby placing added pressure on elected judges to favor constituents—especially as election time approaches. As the district court observed, "in a system of single-member subdistricts, there would be some pressure on elected judges to respond to specific electoral constituents when one of their constituents is involved in litigation against a nonresident of that subdistrict. The at-large system eliminates this pressure by linking the judge's jurisdiction and elective base." *Nipper*, 795 F. Supp. at 1547.

The appellants suggest that the favoritism effects subdistricting might engender could be minimized by transferring cases to "neutral" judges when constituents from different subdistricts are litigants. If all cases are to be heard by judges who have not been elected by any of the litigants, such a system, which would essentially require that cases be decided by "visiting" judges, would clash with Florida's current model, which emphasizes a basic level of accountability of trial court judges to those

over whom they exercise primary jurisdiction. If the message that race matters in the administration of justice is implicit in court-ordered subdistricts, "neutral" judges could not be located. Where favoritism concerns are rooted in racial issues, there seemingly cannot be any such thing as a "neutral" judge to whom a case involving litigants of different races could be transferred.

2.

A related remedy would be to carve out one or more new circuits from the existing Fourth Circuit territory, thereby creating new circuit courts instead of electoral subdistricts for the existing court.[92] The appellants note that their proposed subdistricts (which would be located in the northwest quadrant of Duval County and contain sufficient black voters to enable them to elect a candidate of choice) would actually have a population larger than the existing Third Circuit (which consists of seven rural counties in North Florida), thus suggesting that it easily could be converted into an independent circuit.

Creating new circuit courts would preserve the State's linkage interest. Indeed, if linkage is the primary policy underlying the current Florida system of judicial elections, then creating subdistricts would do more to undermine the scheme than establishing additional (albeit smaller) circuit courts.

Although creating new majority-minority circuits would preserve the linkage interest, such an approach would require a modification of Florida's venue rules; [93]

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[92] County courts are required by Article V of the Florida Constitution to follow county lines; thus, the creation of new county courts must be accompanied by the creation of new counties.

[93] Under Florida venue law, "actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located." Fla.Stat.Ann. § 47.011 (West 1994).

it would also alter the composition of the courts' jury pools.[94] With the creation of black jurisdictions and white jurisdictions, a system of separate justice would be established. Cases brought by blacks against blacks or by whites against whites could be transferred to the black or white courts, respectively. But there would be no transferee court for cases involving parties of more than one race.

3.

A third remedial option suggested by the appellants would be to adopt a cumulative voting system for the election of trial court judges.[95] Under a cumulative voting system, typically used in electing corporate directors, each voter casts a number of votes equal to the number of seats at issue and may allocate those votes among candidates as he or she sees fit.[96] Thus, votes may be concentrated on those candidates whom voters support most strongly.

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[94] The jury pools would reflect the racial compositions of the new circuit territories.

[95] The appellants contended, in the district court, "that a remedial approach other than subdistricting, such as cumulative voting, would satisfy the state's interest in linking jurisdiction with elective base while promoting greater opportunities for black voters." *Nipper*, 795 F. Supp. at 1548.

[96] According to Black's Law Dictionary 343 (5th ed. 1979), cumulative voting is defined as follows:

> Type of voting in which a stockholder may cast as many votes for directors as he has shares of stock multiplied by the number of directors to be elected. The stockholder may cast all his votes for one or more but fewer than all the directors on the slate, and hence, minority representation is promoted. Cumulative voting is *required* under the corporate laws of some states, and is *permitted* in most states.

For a discussion of how cumulative voting might be employed to encourage minority representation in public office, see Karlan, *supra* note 4, at 231-36; *see also* Daniel D. Polsby & Richard D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 Mich.L.Rev. 652, 672 (1993).

Although cumulative voting would preserve linkage and avoid many of the concerns accompanying a subdistricting plan, such a scheme would create problems of its own. The traditional corporate cumulative voting method, or a modification thereof, would not be workable if Florida's numbered post system were maintained. Requiring judges to run for unnumbered seats on the court, meaning that all of the judges seeking reelection would be forced to oppose each other, would have a detrimental effect on the collegiality of the court's judges in administrative matters. Furthermore, requiring judges to face such opposition would dampen lawyer interest in a judicial career, thereby decreasing the pool of candidates. A lawyer contemplating a run for judicial office currently relies on the fact that he or she will not have to compete against every judge up for reelection. Moreover, the lawyer expects that, if elected, the power of incumbency (a feature of the current system) will probably ensure his or her retention in office. In addition to dampening lawyer interest in a judicial career, requiring judges to face opposition every time their terms expire would adversely affect the independence of the judiciary: Judges would begin running for reelection from the moment they took office.

Requiring judges to run against one another every time they seek reelection would also impinge on the operation of Florida's merit selection process. Merit selection insulates judges from popular pressure and facilitates impartial decision making in controversial cases. Merit selection helps a qualified individual who lacks political clout or voter recognition both to obtain and to retain a judgeship; cumulative voting would have the inverse effect.

Finally, a cumulative voting system, like a subdistricting system, would encourage racial bloc voting. That, in turn, would necessarily fuel the notion that judges were influenced by race when administering justice.

B.

The only benefit black voters could legitimately expect from a court order implementing one of the appellants' proposed remedies, which would enable them to elect black judges of their choice, is the *perception* that the challenged circuit and county judicial systems are colorblind. According to testimony presented to the district court, these systems are colorblind; the witnesses testified uniformly that the circuit and county court judges are deciding cases fairly, regardless of the race of the litigants.

By altering the current electoral schemes for the express purpose of electing more black judges, the federal court in fashioning the alteration, and the state courts in implementing it, would be proclaiming that race matters in the administration of justice. As Justice Brennan has observed, "even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness...." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173, 97 S. Ct. 996, 1014, 51 L. Ed.2d 229 (1977) (Brennan, J., concurring in part). Like other race-conscious remedies, this "tends to entrench the very practices and stereotypes the Equal Protection Clause is set against." *De Grandy*, U.S. at , 114 S. Ct. at 2666 (Kennedy, J., concurring in part). The case at hand, therefore, presents a remedial paradox: A remedy designed to foster a perception of fairness in the administration of justice would likely create, by the public policy statement it would make, perceptions that undermine that very ideal.[97] In the eyes of the public and litigants, at least, justice would not remain colorblind.

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[97] In the legislative context, a remedial plan may "reinforce[ ] racial stereotypes and threaten[ ] to undermine our system of representative democracy by signaling to elected officials that they represent a

In sum, because none of the remedies the appellants propose could be implemented without undermining the administration of justice in the courts of the Fourth Circuit and Duval County, the appellants are not entitled to relief under section 2 of the Voting Rights Act.

VI.

In summary, we hold as follows: To establish a case of liability under section 2's results test, a plaintiff must demonstrate, under the totality of the circumstances, that the voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the voting power of the minority group the plaintiff represents. In cases challenging the election of judges, the totality of the circumstances analysis, which was developed in the legislative election context, must be altered to take into account the characteristics unique to judicial elections. Among the factors a court must consider in conducting that analysis is the state policy advanced by the judicial election scheme at issue. Finally, a section 2 plaintiff will not be granted relief if the remedy sought would have the effect of undermining the court's ability to administer justice.

The judgment of the district court is, therefore, AFFIRMED.

IT IS SO ORDERED.

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particular racial group rather than their constituency as a whole." *Shaw v. Reno*, U.S. , 113 S. Ct. 2816, 2828, 125 L. Ed. 2d 511 (1993). This effect may be more pronounced when interjected into an institution, like the state judiciary, that eschews the legislature's tradition of responsiveness.

(CONCUR In Part BY: EDMONDSON)

EDMONDSON, Circuit Judge, concurring in the opinion in part and concurring in the result, in which COX, BIRCH and DUBINA, Circuit Judges, join:

For me, the point that determines the outcome of the case is this one: The State of Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, as a matter of law, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) what ever minority vote dilution that may possibly have been shown here. *See Houston Lawyers' Assoc. v. Attorney General*, 501 U.S. 419,424-26, 111 S. Ct. 2376, 2380, 115 L. Ed. 2d 379 (1991); *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 868 (5th Cir.1993); *see also, Holder v. Hall*, U.S. , 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994). So, I concur in today's result.

I also concur in Parts III(A) and III(B)(1) of Chief Judge Tjoflat's opinion. I understand Part V of the Chief Judge's opinion to conclude that each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system. I concur in this conclusion, which I see as the holding of this case. But I cannot agree (and I doubt the Chief Judge means to say) that a remedy must undermine the administration of justice in the state courts before that remedy would fall beyond the power of the federal courts to impose under the Voting Rights Act.

I do not say that the rest of the Chief Judge's opinion is wrong. But, I believe the conclusions reached in the other parts are unessential to deciding this case; and to decide nothing about what seem to be unnecessary issues seems best.

DISSENT

HATCHETT DISSENT: HATCHETT, Circuit Judge, dissenting, in which KRAVITCH, Circuit Judge, joins:

In this case, although the majority finds that a vote dilution occurred, the majority affirms the district court's decision to deny the appellants relief under section 2 of the Voting Rights Act (Act). In reaching this conclusion, two judges (Chief Judge Tjoflat and Judge Anderson) would have us hold, for the first time in American law, that in addition to the three threshold factors described in *Thornburg v. Gingles*, and the Senate factors, a plaintiff class must also show the existence of racial bias motivating the voting community in order to prevail on a section 2 claim. The majority holds that Florida's interest in linking the jurisdictional and electoral bases of its state circuit and county judges precludes the fashioning of any remedy the appellants suggest or a court could devise.[1]

To reach these results, the two judges employ a strained review of the legislative history and Supreme Court interpretation of section 2 of the Voting Rights Act. Yet, despite this searching effort, absolutely no

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[1] Fortunately, the majority opinion should not have far reaching consequences. First, although it is an *en banc* decision, one-third of the court did not participate in the consideration of this case. Second, the record in this case lacks any *evidence* regarding the state's relative interest in maintaining its at-large elections for trial judges. All of the judges participating in this case agree that black voters are unable to elect candidates of their choice in the Fourth Circuit and Duval County; but, a majority of the judges believe that no feasible remedy exists to redress the black voters' claim.

In future cases, the state will be required to present evidence regarding the relative strength of its interest in at-large elections for trial judges now that the *en banc* court has found that the at-large voting scheme in the presence of bloc voting constitutes vote dilution.

authority exists in either the case law, the legislative history, or the language of the Act to support the two judges' suggestion to impose a racial bias inquiry into Voting Rights Act litigation. As to the majority's holding regarding linkage of county and circuit courts, moreover, neither the appellants, appellees, nor the district court ever presented or considered any factual evidence to support the majority's conclusion that Florida's interest in linking the jurisdictional and electoral bases of its judges precludes the acceptability of *any* possible remedy the appellants could devise. This is the case for one simple reason: the district court never reached the question of a remedy. The panel never discussed a remedy because the district court found no violation of the Act. The *en banc* court has tried the remedy issues without the parties' participation. In essence, the en banc court has misconstrued voting rights jurisprudence, usurped the role of the district court as finder of fact, and substituted conjecture for evidence. For these reasons, I must dissent.

I. The Inquiry Into the Racial Bias of the Voting Community

The history, development, and application of section 2 of the Voting Rights Act illuminates the frailty of the two judges' position that a successful voting rights challenge, brought pursuant to amended section 2 of the Voting Rights Act, requires a finding of racial bias in the voting community. A careful review of this history demonstrates that Congress and the Supreme Court have never required as a threshold issue an inquiry into the private motivations of individual voters to substantiate a vote dilution claim. Instead, the Supreme Court's voting rights jurisprudence reveals that the proper focus of a voting rights challenge has always been whether the *state,* intentionally or otherwise, maintained an electoral system that disadvantages minorities on account of race. A review of this jurisprudence confirms that voting

rights plaintiffs can challenge any state-enforced structural impediments that operate to disparately impact the ability of minority voters to elect their preferred candidates on account of race. The following brief historical review demonstrates that the racial motivations of private individual voters has neve been the fundamental basis for a voting rights challenge.

A. Development of Amended Section 2

The Constitutional Conveners designed the Fourteenth and Fifteenth Amendments to establish and protect the rights of the newly emancipated slaves. The Fourteenth Amendment endowed former slaves with citizenship and equal protection under the laws; the Fifteenth Amendment specifically prohibited the states from abridging or denying the rights of the former slaves to vote on account of race. U.S.Const.Amend. XIV, § 1; U.S. Const. Amend. XV, § 1. The framers authorized Congress to enforce the Fifteenth Amendment through appropriate legislation. U.S. Const. amend. XV, § 2.

However, the Supreme Court has never applied these two amendments to regulate the conduct of private individuals in elections for state officers. For example, Congress enacted several enforcement acts to more clearly define the contours of the new protections for black people afforded in the Fourteenth and Fifteenth Amendments. The enforcement acts, among other things, aimed to prohibit private individuals, such as the Ku Klux Klan, from conspiring to prevent black people from exercising their newly acquired civil rights. *See* Robert M.Goldman, *A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877-1893* 11-15 (New York: Garland Publishing, 1990). The Supreme Court repeatedly struck down the convictions of private individuals under the acts because the Fourteenth and Fifteenth Amendments from which the acts derived their authority regulated

the conduct of state officials rather than private individuals. *See United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876) (holding that the Fourteenth Amendment only applies to state action); *Virginia v. Rives*, 100 U.S. 339, 25 L.Ed. 676 (1880) ("The provisions of the Fourteenth Amendment ... all have reference to state action exclusively, and not to any action of private individuals"); *Civil Rights Cases*, 109 U.S. 1, 3 S. Ct. 150, 27 L. Ed. 835(1883); *James v. Bowman*, 190 U.S. 127, 23 S. Ct. 678, 47 L. Ed. 979 (1903) (the Fifteenth Amendment "relates solely to action 'by the United States or by any state,' and does not contemplate wrongful individual acts."); *but see Exparte Yarbrough*, 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274 (1884) (the Fourteenth Amendment does not proscribe private action; but the interest of the federal government in national elections can proscribe individual interference with a citizen's voting rights).

The Voting Rights Act of 1965 represents the culmination of Congress's noble efforts to create an effective tool for rooting out and redressing discriminatory voting practices. *See* 42 U.S.C. §§ 1971 *et seq.* Amended section 2 of the Act prohibits a *state* from imposing any voting qualification or practice which results in the denial or abridgement of the right of any citizen to vote on account of race. Thus, Congress tailored this section to fit within the constitutional confines of its ability to regulate state action rather than the activity of private individuals.[2] The Supreme Court has upheld the validity of

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[2] Certain sections of the Act prohibit individual action. Section 1971(b) prohibits interference with voting rights in federal elections. 42 U.S.C. § 1971(b). This provision, however, is consistent with the Supreme Court's approval of this type of prohibition in Ex Parte Yarbrough, 110 U.S. 651, 28 L.Ed. 274, 4 S. Ct. 152 (1884) pursuant to the federal government's interest in maintaining the integrity of its elections. Section 1973i(b) regulates the conduct of private individuals in all elections; however, the constitutionality of this section is questionable. See *United States v. Harvey*, 250 F. Supp. 219 (D.C.La.1966)

all or part of the Voting Rights Act of 1965 under the enforcement provisions of the Fourteenth and Fifteenth Amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966); *Georgia v. United States*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973); *Briscoe v. Bell*, 432 U.S. 404, 97 S. Ct. 2428, 53 L. Ed. 2d 439 (1977); *Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970).

For this reason, in early voting rights litigation, the federal courts applied the same standards to vote dilution claims under the Fifteenth Amendment and section 2 of the Voting Rights Act. *See Mobile v. Bolden*, 446 U.S. 55, 100S. Ct. 1490, 64 L. Ed. 2d 47 (1980) ("the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and ... it was intended to have an effect no different from that of the Fifteenth Amendment itself"); *see also* Frank R. Parker, *The Results Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va.L.Rev. 715 (1983) (the courts may have considered independent discussion of the section 2 standard to be superfluous).Successful Voting Rights Act challenges under the Fifteenth Amendment and the Act targeted only the intentions or consequences of state-enacted voting rights regimes. The racial bias inquiry was only relevant to demonstrate the intent of the legislature in utilizing a particular electoral system that disadvantaged racial minorities.

Hence, a fundamental flaw exists in the two judges' assertion that an inquiry into the racial bias of the voting community is implicit in early vote dilution cases. The

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(holding that the section is unconstitutional as applied to private individuals in nonfederal elections in light of Supreme Court precedent). In any event, no reported case has upheld the application of section 2 to private individuals.

flaw is that the Supreme Court has never required an inquiry into the racial bias of a voting community because such a finding is unnecessary for a voting rights violation. The Act does not and cannot prohibit or question the racial biases of individual voters. To the extent racial bias is significant in a voting rights case, it concerns the motivations of state officials in employing a particular electoral scheme that operates to disadvantage voters on account of their race.

The various Supreme Court cases construing the Voting Rights Act in tandem with the Fourteenth and Fifteenth Amendment confirm that the Act never relied upon a finding of racial bias in the voting community as the significant factor in a vote dilution claim, but instead focused on the biases and effects of state action.

B. Section 2 Litigation Prior to *City of Mobile v. Bolden*

A trilogy of cases arose after enactment of the Voting Rights Act defining the scope and limitations of the protections against vote dilution under the Constitution and the Voting Rights Act.[3] *Zimmer v. McKeithen*, 485 F.2d 1297(5th Cir.1973), *affirmed sub nom., East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296 (1976); *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). In these three cases, the Supreme Court and the Fifth Circuit addressed the issue of what evidence was sufficient to establish a section 2 violation in a minority vote dilution case.

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[3] The principle that the right to vote can be abridged unconstitutionally through dilution of one's voting strength derives its authority from *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the landmark one-person-one-vote legislative reapportionment case. The court concluded that the right to vote encompasses protections against dilution of the vote as well as the right to cast a ballot.

In *Whitcomb*, the Supreme Court concluded that the plaintiffs failed to prove a vote dilution claim because they presented no evidence that the state's districts "were conceived, or operated as purposeful devices to further racial or economic discrimination" or that minorities had "less opportunity ... to participate in the political process and elect legislators of their choice." *Whitcomb*, 403 U.S. at 149, 91 S. Ct. at 1872. Thus, the Supreme Court recognized that plaintiffs could utilize evidence of subjective intent of state officials or objective evidence of disparate impact to establish a claim.

Similarly, in *White*, the Supreme Court upheld a claim that "multimember districts [were] being used invidiously to cancel out or minimize the voting strength of racial groups" based solely on objective evidence. 412 U.S. at765-67, 93 S. Ct. at 2339-40. The evidence consisted of various state-sponsored practices and the operation of a powerful political organization that utilized "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." 412 U.S. at 767, 93 S.Ct. at 2340.

Finally, in *Zimmer*, the Fifth Circuit held that a voting system is unconstitutional under the Fourteenth Amendment if certain objective factors demonstrate that the system results in the dilution of minority votes. The Fifth Circuit further clarified that plaintiffs can prevail on a vote dilution claim if they can prove either racial bias in the legislature or that an apportionment scheme operates to "minimize or cancel out the voting strength" of minorities. *Zimmer*, 485 F.2d at 1304. To prove the latter claim, the majority listed much of the same indicia concerning state action that the Supreme Court announced in *White* and *Whitcomb*.

The objective factors described in each of these cases concerned the activities of state and quasi-state officials in employing various devices to obstruct the ability of

racial minorities to elect candidates of their choice.[4] To the extent the courts even remotely invoked the concept of racial bias in the voting community, it only concerned whether political parties utilized racial appeals to cater to the racial preferences of voters.[5] *See White*, 412 U.S. at 767, 93 S. Ct. at 2340 (Court found party operatives relied "upon racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community").

Hence, in the pre-*Bolden* era, voting rights plaintiffs could demonstrate a vote dilution claim by either establishing that (1) the state purposely designed an electoral scheme to inhibit the ability of minorities to elect candidates, or (2) the state maintained an electoral scheme that resulted in the inability of minorities to elect candidates on account of their race. The pre-*Bolden* era did not proscribe individual voter racial discrimination; instead, it proscribed the machinations of state officials that intentionally or effectively presented a racial bar to the ability of minorities to elect their favored candi-

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[4] Political party officials are quasi-state officials. For example, in *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944) the Supreme Court held that when primaries become an official part of the machinery for choosing state and national officials, the primary officials become state agents whose actions constitute state action. *See also Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) where the Supreme Court held that the activities of an unofficial political organization which effectively controlled the democratic party process could not operate to avoid the impermissible shroud of state action under the Fifteenth Amendment.

[5] As stated in note 4, political party officials are shrouded with the authority of the state. *See Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88L. Ed. 987 (1944) (holding that activities of state-regulated political parties constitute state action); *Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed.1152 (1953) (activities of unofficial political organization which effectively controls the Democratic party fall within the confines of the Fifteenth Amendment).

dates. The utilization of voting districts that allow racial bloc voting to defeat minority candidates is one such racial bar. *See Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L. Ed. 2d 25 (1986).

C. The Voting Rights Act After *Bolden*

After the Supreme Court eliminated the results test for proving a vote dilution claim under the Fourteenth or Fifteenth Amendment, *see Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), Congress amended the Act explicitly stating that it wished to reinstate the test as previously articulated in *Whitcomb*, *White*, and *Zimmer*. Consequently, for the first time, the Voting Rights Act left the shadows of the Fourteenth and Fifteenth Amendments and became a potent and independent basis for protecting the rights of minorities against vote dilution. The text and legislative history of the Act clearly reject the two judges' attempt to impose a racial bias inquiry into section 2 vote dilution claims.

1. Textual Analysis

The plain text of amended section 2 rails against the two judges' contention that Congress intended to retain a racial bias inquiry rather than rely merely on a results test in vote dilution claims. The text provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes ... are not equally open to participation by members of a [protected class] in that its members have less

> opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis added).

The unambiguous language of section 2 expressly provides that voting standards, practices, or procedures may not be used in a manner that "results" in the denial of the right to vote on account of race, and a violation occurs if, based on the totality of the circumstances, minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." In no manner does this language reference a need to inquire into the racial biases of individual voters. Instead, the plain language clearly envisions plaintiffs proving vote dilution solely through a showing of the discriminatory "results" or effects of a state's electoral system or practice. *See Gingles*, 478 U.S. at 35, 106 S. Ct. at 2758; *Chisom v. Roemer*, 501 U.S. 380, 384, 111 S. Ct. 2354, 2358, 115 L. Ed. 2d 348, 356 (1991) (Section 2 makes "clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.").

The two judges would have us envision language that does not exist and ignore the language right before our eyes; for example, the assertion that a racial bias inquiry is implicit because the "on account of race" language must be reconciled with the language prohibiting proportional representation. Yet, the results test inquiry as

described in the pre-*Bolden* era and adopted by Congress has never guaranteed a right to proportional representation; instead, it guarantees protection from vote dilution due to racial bloc voting. *White*, 412 U.S. at 765-66, 93 S. Ct. at 2339-40 ("it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its potential"); *Zimmer*, 485 F.2d at 1305 ("it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives."). As outlined in *Gingles*, a vote dilution claim only ensues when under the totality of the circumstances, racial bloc voting impedes the ability of a geographically compact, and politically cohesive racial minority to elect its preferred candidate.

Similarly, the assertion that the "on account of race" language must refer to racial bias in the voting community is untenable. The phrase merely emphasizes that "race" rather than some other factor must be the identifiable impediment to the minority group's electoral success. In fact, the Senate Report accompanying the amendment expressly stated that the phrase "on account of race" does not imply any reference to purposeful racial discrimination. S.Rep. No. 417 at 27-28n. 109, *reprinted* in 1982 U.S.C.C.A.N. at 177, 205-06.

Contrary to the two judges' assertion, the terms "racial bias," "intent," and "invidious discrimination" do not appear anywhere explicitly or implicitly in the text of section 2. Had Congress meant to require an inquiry into the racial bias of the voting community, it certainly would have recorded that intent more fully in the language of the amended statute.[6] It did not.

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[6] The section 2 result standard is the product of an extensive year long congressional debate commencing in May, 1981 and ceasing in June, 1982. *See* Frank R. Parker, *The Results Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va.L.Rev. 715 (1983).

The two judges' intimation that our interpretation might render section 2 unconstitutional is also groundless. As discussed earlier, the Supreme Court never applied the Fifteenth Amendment and its implementing legislation to activities of private individuals. *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876) (holding that Fourteenth Amendment only applies to state action); *Virginia v. Rives*, 100 U.S. 339, 25 L. Ed. 676 (1880) ("The provisions of the Fourteenth Amendment ... all have reference to state action exclusively, and not to any action of private individuals"); *Civil Rights Cases*, 109 U.S. 1, 3 S. Ct. 150, 27 L. Ed. 835 (1883); *James v. Bowman*, 190 U.S. 127,23 S. Ct. 678, 47 L. Ed. 979 (1903) (the Fifteenth Amendment "relates solely to action "by the United States or by any state,' and does not contemplate wrongful individual acts."). The Court consistently held that the proper constitutional inquiry under voting rights claims is whether state-enforced election procedures obstruct the ability of racial minorities to elect their favored candidates, either intentionally or in effect. As the Supreme Court held in *City of Rome v. United States*, 446 U.S. 156, 173, 100 S. Ct. 1548, 1559-60, 64 L. Ed. 2d 119(1980), Congress may, "pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect."

2. Legislative History of Amended Section 2

The two judges' assertions also mistakenly rely upon the legislative history in an effort to locate some evidence of a congressional intent to require a racial bias inquiry. This interpretation is wrong as demonstrated by one passage in the Senate Report:

> During the Committee deliberations, opponents of the results test argued that the reported bill is inconsistent with the results standard because Section 2, as amended, still contains the phrase "a denial or abridgement [of the right to vote] on

> account of race or color." The argument is that the words "on account of" themselves create a requirement of purposeful discrimination. This claim over looks the present structure of the Voting Rights Act, which completely refutes it. Section 5 of the present Act requires the Attorney General or the district court to disapprove a proposed voting law change unless the submitting jurisdiction establishes that it "does not have the purpose *and will not have the effect of denying or abridging the right to vote on account of race or color....*" ... Thus it is patently [clear] that *Congress has used the words "on account of race or color" in the Act to mean "with respect to" race or color, and not to connote any required purpose of racial discrimination.* Any other arguments based on similar parsing of isolated words in the bill, that there is some implied "purpose" component in Section 2, even when plaintiffs proceed under the results standard, are equally misplaced and incorrect.

S.Rep. No. 417 at 27-28 n. 109, *reprinted in* 1982 U.S.C.C.A.N. at 177, 205-06 (first emphasis in original, second emphasis added).

Congress could not have expressed more explicitly and emphatically its goal of dispensing with any requirement of proving discriminatory intent, instead focusing the inquiry on whether the state's electoral process allows objective factors as described in *Thornburg v. Gingles* to deny racial minority voters an equal opportunity to participate in the electoral process and elect candidates of their choice. 42 U.S.C. § 1973(b); see also S.Rep. No. 417 at 27, 28, *reprinted in* 1982 U.S.C.C.A.N. at 177, 204, 205.

In other sections of the Senate Report, Congress clearly described its objective to restore the legal landscape that governed voting discrimination cases prior to *Bolden*. S.Rep. No. 417 at 2, *reprinted in* 1982 U.S.C.C.A.N. at

177, 178-79. Congress believed that under the pre-*Bolden* case law, voting rights plaintiffs could rely solely upon the discriminatory effect of an electoral regime:

> In the pre-*Bolden* cases plaintiffs could prevail by showing that a challenge delection law or procedure, in the context of the total circumstances of the local electoral process, had the result of denying a racial or language minority an equal chance to participate in the electoral process.
>
> ....
>
> As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, designedly *or otherwise*, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, just as much as outright denial of access to the ballot box.

S.Rep. No. 417 at 16, 28, *reprinted in* 1982 U.S.C.C.A.N. at 177, 193, 205 (emphasis added).

In repudiating *Bolden* and returning to the *White/Zimmer* standard, Congress explicitly approved of the effect-based approach of the results test:

> The "results" standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote. Specifically [the amendment] embodies the test laid down by the Supreme Court in *White*.
>
> If the plaintiff proceeds under the "results test", then the court would assess the *impact* of the challenged structure or practice on the basis of objective factors, rather than making a determination about motivations which lay behind its adoption or maintenance.

S.Rep. No. 417 at 28, *reprinted* in 1982 U.S.C.C.A.N. at 177, 205 (emphasis added). Thus, the two judges can find

no solace in Congress's attempt to reinstate the pre-*Bolden* effect/impact-based test which required no inquiry into the racial motivations of the voting community.

Moreover, the passages the two judges rely upon to support their interpretation actually undermine their argument. For example, they invoke the following passage in the Senate Report to support their position:

> The results test makes no assumptions one way or the other about the role of racial political considerations in a particular community. If the plaintiffs assert that they are denied fair access to the political process, in part because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

S.Rep. No. 417 at 34, *reprinted in* 1982 U.S.C.C.A.N. at 177, 212. This quoted passage proves nothing other than one of the *Gingles* prerequisites that the Supreme Court and all other federal courts have recognized: that is, voting rights plaintiffs must demonstrate racial bloc voting. It says nothing implying that the courts should look into the intent of the voting community when applying the results test. In fact, the Senate Report states: "The results test makes no assumptions one way or the other about the role of racial political considerations in a particular community."

In precise language, the Senate Report further explains that exploring racial motivations as an element of proof is exceedingly divisive because

> it involves charges of racism on the part of individual officials or entire communities.... Litigators representing excluded minorities will have to explore the motivations of individual counsel members, mayors, and other citizens under *Bolden*. The question would be whether their decisions were motivated by invidious racial discrimination.

The two judges profess that the preceding quote precludes our interpretation. Obviously, this quote means nothing other than what it says: Congress did not intend to require plaintiffs to inquire into the racist motives of either individual officials or entire communities—including the voters therein. S.Rep.No. 417 at 36, *reprinted in* 1982 U.S.C.C.A.N. at 177, 214.

The legislative history conclusively shows that, despite the two judges' emphasis on racial bias in the voting community, Congress intended to shift the entire focus of vote dilution claims to the discriminatory effect of an electoral regime upon minority voters. Senator Dole, who offered the substitute amendment which the Senate ultimately adopted, confirms this interpretation:

> It should be reemphasized that *the "results" test* contained in the substitute amendment *in no way includes an element of discriminatory purpose.* I am aware that some have sought to characterize the *White* holding as including an ultimate purpose requirement or a so-called "objective design" element. The implication of this characterization is that the substitute amendment codifies the *White* standard, the amendment also includes some requirement of discriminatory purpose. But in presenting my compromise before the Committee, *I explicitly stated that "the supporters of this compromise believe that a voting practice or procedure which is discriminatory in result, should not be allowed to stand, regardless of whether there exists a discriminatory purpose....*
>
> My colleagues and I who offered the substitute amendment remained convinced that Section 2 should only require plaintiffs to establish discriminatory "results" and rejected the notion that *any element of purpose should be incorporated into the standard.*

S.Rep. No. 417 at 194-95, *reprinted in* 1982 U.S.C.C.A.N. at 177, 365 (emphasis added). In concluding that Con-

gress intended to include a racial bias element in amending Section 2, the two judges simply desecrate the legislative history surrounding that amendment.

In sum, the two judges' interpretation of the legislative history falls ofits own weight. First, they state that the 1982 amendment was meant to restore the invidious discrimination requirement which was purportedly articulated in *Whitcomb* and *White*. In addition to the fact that no such intention appears in the legislative records or reports, as explained earlier, the *Whitcomb* and *White* courts only addressed the objective actions of state and quasi-state officials in hampering the ability of minorities to vote. Second, such an interpretation of the legislative history would render it incongruous. How could an inquiry into the racial bias of the voting community be any less divisive than an inquiry into the racial bias of state officials? Fortunately, the en banc court has rejected, or at the least, not approved of a racial bias test, in spite of the urgings of two judges.

D. A More Viable Interpretation of Section 2

Congress clearly intended to dispense with any racial bias or intent inquiry invote dilution claims without guaranteeing a right to proportional representation. Thus, under well-settled Supreme Court precedent, when voting rights plaintiffs establish the three *Gingles* threshold factors—geographical compactness, political cohesiveness, and racial bloc voting—defendants can still demonstrate that under the totality of the circumstances, the plaintiffs have failed to present a valid vote dilution claim. *See Johnson v. DeGrandy*, U.S. , 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) (totality of the circumstances could not support a vote dilution claim where Hispanics could be expected to elect their candidates in proportion to their percentage of the area's population).

In fact, the idea of a racial bias requirement is merely a resurrection indifferent garb of a claim expressly rejected by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 61-74, 106 S. Ct. 2752, 2772-79, 92 L. Ed. 2d 25(1986). In *Gingles*, North Carolina argued "that the term "racially polarized voting' must, as a matter of law, refer to voting patterns for which the *principal cause* is race." *Gingles*, 478 U.S. at 61, 106 S. Ct. at 2772 (emphasis in original). In rejecting this claim, the Supreme Court drives the final stake through the heart of the two judges' contention "that racial bias in the voting community remains the keystone of section 2 vote dilution claims." The Supreme Court rejected North Carolina's claim on the following basis:

> [The] *suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail* for the very reasons Congress rejected the intent test with respect to governmental bodies.
>
> ....
>
> In sum, we hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. *Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.*

Gingles, 478 U.S. at 71, 106 S. Ct. at 2777 (emphasis added).

In amending section 2, Congress aligned voting rights law with the time-tested impact analysis utilized in other areas of statute-based civil rights law protecting minority members from disparate treatment on account of their race. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct.849, 853, 28 L. Ed. 2d 158 (1971) (Title VII

proscribes overt discrimination and practices which are discriminatory in operation); *Teamsters v. United States*, 431 U.S. 324, 335 n. 14, 97 S. Ct. 1843, 1854 n. 14, 52 L. Ed.2d 396 (1977) (discriminatory motive not required under adverse impact theory where focus is on consequences of selection criteria or challenged practice); *Ellston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.1993)(regulations promulgated pursuant to Title VI validly proscribe actions having disparate impact on protected groups even if those actions are not intentionally discriminatory); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir.1992) ("outcome approach" of Section 2 means an opportunity to show what would be called "disparate impact" in employment cases), *cert. denied*, U.S. , 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993); *Potomac Group Home v. Montgomery County, Md.*, 823 F. Supp. 1285, 1295 (D.Md.1993) (plaintiffs may demonstrate violation of Fair Housing Amendments Act by showing discriminatory intent or discriminatory impact). We must not so casually disrupt the wisdom of this approach.

Rather than upsetting the Supreme Court's and Congress's well-established approach to evaluating vote dilution claims by requiring plaintiffs to prove invidious discrimination in the electorate as a whole as part of their prima facie case, we must continue to adhere to the time-tested totality of circumstances test prescribed in *Gingles*. If this court ever adopts the rejected racial bias/intent test, the court will ensure that a politically cohesive and geographically compact racial minority will rarely be permitted to elect representatives of their choice when serious racially polarized voting exists. A majority of the court wisely rejects the racial bias approach in voting cases.

II. Rejection of Plaintiffs' Remedies

I also dissent because this court has prematurely determined the issue of whether the appellants or the

district court can devise a viable remedy for their vote dilution claim. *See Holder v. Hall*, U.S. , 114 S. Ct. 2581, 129L. Ed. 2d 687 (1994) (a court must find a reasonable alternative practice against which to measure the existing voting practice); *Houston Lawyers' Association v. Atty. Gen.*, 501 U.S. 419, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991). After finding a violation of the Act, instead of properly remanding this case to the district court to make findings of fact and conclusions of law regarding viable remedies, the majority opinion relies almost entirely upon speculation and conjecture to support its holding that Florida's interest in conserving its current at-large voting system precludes any possible remedy the appellants or the district court can devise.

It is the district court, with the help of the parties, that must provide a remedy for a vote dilution violation. The en banc majority does not discuss district court findings, or conclusions, or witness testimony, or documents, or studies, or affidavits, or the testimony of expert witnesses to support its holding that no remedy can be afforded.

A. Inadequacy of the Trial Record and Necessity for Remand

It has long been the policy of this court that "where the trial court fails to make findings ... on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made." *Davis v. United States*, 422 F.2d 1139, 1141(5th Cir.1970).[7] This court will decide the "merits of an appeal in the absence of fact-findings in the rare case in which a full understanding of the issues can be reached without the aid of findings."

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[7] In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir.1981) this court adopted as binding precedent all of the decisions of the Fifth Circuit rendered prior to September 30, 1981.

Davis, 422 F.2d at 1142; *see also Tejada v. Dugger*, 941 F.2d 1551, 1555 (11th Cir.1991); *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir.1976). Thus, this court rarely considers issues not ruled upon in the district court and only does so if the record sufficiently conveys all the relevant information for a full and complete review.

Prior to this appeal the district court found that Florida "has a legitimate interest in maintaining the current at-large system of electing judges in the Fourth Judicial Circuit and Duval County." *Nipper v. Chiles*, 795 F. Supp. 1525, 1548 (M.D.Fla.1992). The district court, however, expressly declined to consider whether Florida's interest in maintaining its at-large voting system precluded the acceptability of any of the appellants' proposed remedies because it found no voting rights violation. *See Nipper*, 795 F. Supp. at 1548 n. 28 ("The Court has no occasion to consider this contention, since proposed remedies are relevant only if a violation is proved."). In light of the majority's holding that a vote dilution has occurred, which I join, this court should remand the case to the district court to supplement the record with factual findings concerning the relative weight of Florida's interest in maintaining its current electoral system and the viability of any remedies. Only then can the en banc court properly exercise appellate review.[8]

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[8] The plurality (Judge Edmondson's concurrence) holds that "Florida's interest in maintaining linkage between jurisdiction and the electoral bases of its trial judge is, as a matter of law, great and outweighs ... whatever minority vote dilution that may possibly have been shown here." In fact, *Houston Lawyers' Assoc. v. Attorney General*, 501 U.S. 419, 426-28, 111 S. Ct. 2376,2381, 115 L. Ed. 2d 379 (1991), holds that "because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the "totality of the circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution."

B. Florida's Interest in At-Large Elections Does not Preclude All of the Plaintiffs' Possible Remedies

The majority opinion's analysis demonstrates that it could benefit from further fact-finding. The opinion holds, with no evidentiary corroboration, that Florida's interest in maintaining its current at-large electoral systems for judges precludes the acceptability of any of the appellants' proposed remedies including the use of subdistricts, the creation of new circuits, the adoption of cumulative voting, or any combination of these devises. Instead of evidence, the majority apparently relies upon disembodied conjecture to support its ultimate determination. A careful review of these alternative remedies, however, reveals the true complexity of the issues involved and the need for further hearings before the district court.

1. The Use of Subdistricting in Judicial Elections

The majority affords great weight to Florida's interest in linking the electoral and jurisdictional bases of its judges in Duval County and the Fourth Circuit. The majority believes the implementation of subdistricts to redress the plaintiffs' claim for vote dilution would unduly erode the independence of judges and balkanize the judicial landscape into black and white subdistricts governed by racially biased judges. Such a system, the majority concludes, will ultimately destroy the impartiality of the judges which exists today. To demonstrate that Florida wishes to insulate state judges from political pressures, the majority highlights Florida's progression towards a merit selection, merit retention or gubernatorial appointment system.[9]

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[9] The error in highlighting merit selection and merit retention is that an election is involved in the retention scheme. Such an election may be subject to the Voting Rights Act.

The majority fails to note that subdistricting plans already have been successfully utilized to remedy vote dilution claims in the judicial context. *Martin v. Mabus*, 700 F. Supp. 327 (S.D.Miss.1988); *Clark v. Roemer*, 777 F. Supp.471 (M.D.La.1991). For example, in *Mabus*, a federal district judge fastidiously designed a subdistricting plan that maintained the integrity of judicial impartiality while redressing the plaintiffs' claim. The remedial plan provided for the election of trial judges from single-member subdistricts and required that these judges serve their judicial districts as a whole. The court also held that while candidates for judicial office must reside in the judicial district, they need not reside in the electoral subdistrict in which they run for office. New York and Louisiana have experimented with similar subdistricting plans for trial judges. N.Y. Const. art. VI, § 15(a); *Clark v. Roemer*, 777 F.Supp. 471, 477 (M.D. La. 1991). To date, no challenge has arisen in either state concerning the impartiality of the judges elected under the subdistricting plans. To the contrary, one such judge "denied being affected by local pressures, noting that in most cases he does not know whether a party resides within his subdistrict. He also stated that he is aware of no pressure upon his colleagues of either race." *Roemer*, 777 F. Supp. at 477.

Moreover, the majority's aversion to subdistricting plans based on a concern for racial impartiality ignores the fact that the districts from which judges currently are elected have racial characteristics. For instance, the judicial districts in Duval County and the Fourth Judicial Districts now encompass electorates with an overwhelming white majority. If one reasons that the creation of judicial districts comprised predominantly of one racial group destroys racial independence, then judicial independence cannot exist anywhere. Moreover, if elections from districts with overwhelming white majorities produce impartial judges, then no defensible reason exists to believe that black majority districts will produce biased judges.

Similarly, the majority's emphasis on linkage between trial judges and their electoral base is not necessarily warranted. Contrary to the majority's conjecture, Florida has not clearly evidenced that linking these two conditions is a primary component of state policy. The appellees did not introduce any evidence to support such a conclusion. In fact, current assignment rules generally allow judges elected in one district to sit on cases in a different district when necessary or convenient. *See* Fla.Stat. § 26.57 (assignment of county judges to sit as circuit judges). Even when sitting within their own districts, judges must frequently decide cases involving litigants from different districts. Presumably, judges can adjudicate fairly in these situations. It is rather offensive to conclude that the impartiality of judges will somehow become tainted when elected from subdistricts that permit minority voters to elect their preferred candidates.

The majority also assumes that the creation of smaller subdistricts will subject judges to greater political pressure. Yet, the size of Florida judicial election districts already varies widely within the state of Florida. The subdistricts that would result from the appellants' proposed remedies would exceed the size of most of the circuits in other parts of Florida. Florida has no legitimate justification for precluding the use of judicial subdistricts in this case when existing circuits are smaller or about the same size as the proposed subdistrict. Moreover, Florida's maintenance of a judicial election system implies that Florida does not exhibit a strong state policy for insulating judges from political pressures. *See Chisom*, 501 U.S. at 401-02, 111S. Ct. at 2367, 115 L. Ed. 2d at 367 ("The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.")

2. Cumulative Voting and Limited Voting

The majority also glosses over two innovative techniques commentators favor for redressing vote dilution claims. Cumulative voting, a technique, borrowed from the corporate governance law, allows each voter a determinate number of votes that the voter may cast for preferred candidates. Thus, in a cumulative voting regime in which the election involved six candidates, the voter could cast all six votes for the same candidate. This capacity significantly enhances the ability of minorities to elect candidates free of the impediment of recurring bloc voting.

The majority opinion rejects cumulative voting because requiring judges to run against each other "would have a detrimental effect on the collegiality of the judges in administrative matters." In a similar vein, the majority relies in part on the speculation that cumulative voting will dampen lawyer interest in seeking judicial offices. Certainly these trivial concerns are not the core state policy that the Supreme Court envisioned to defeat a vote dilution claim.

The second alternative, which the majority opinion fails to discuss, is limited voting: a device in which voters cast fewer votes than the total number of candidates. This particular electoral technique has garnered strong support among scholars interested in Voting Rights Act litigation. For an analysis of the benefits of limited voting, *see* Samuel Issacharoff, *The Texas Judiciary and the Voting Rights Act: Background and Options* (1989); *see also* Edward Still, *Alternatives to Single Member Districts, in Minority Vote Dilution*, 249, 253-55 (Chandler Davidson ed. 1984); L. Weaver, *Semi-Proportional and Proportional Representation Systems in the United States, In Choosing an Electoral System: Issues and Alternatives*, 191 (Arend Lijphart & Bernard Grofman ed. 1984); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution*

Litigation, 24 Harv. C.R.-C.L.L.Rev. 173, 223-36 (1989); Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 Yale L.J. 144 (1982); Note, *Affirmative Action and Electoral Reform*, 90 Yale L.J. 1811 (1981). Limited voting has several advantages. First, limited voting can be employed in at-large elections, thereby avoiding the disadvantages of single-member districts. Similarly, the problem of state judges being too closely linked to their political constituencies will be strongly diminished. Second, limited voting abolishes the discriminatory effect of multi-member at-large elections by removing the possibility of minority vote dilution.

Although the United States has seldom employed limited voting, other countries have employed the electoral device with inspiring success. For example, England and Japan have used the device to elect certain members of their representative houses. In each case, minority groups were able to elect party members in numbers more proportionate to their percentage of the electorate as a whole than possible under an electoral system based entirely upon single-member districts. *See generally* Shawn Fremstad, *State Judicial Elections and the Voting Rights Act: Defining the Proper Remedial Scheme*, 76 Minn.L.Rev. 101, 114 & n. 77 (1991). In Alabama, limited voting successfully remedied a minority vote dilution claim and increased the number of minority elected officials. *Id.* at 114 n. 78.[10]

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[10] The above exploration of remedies in no way suggests that any particular remedy is appropriate in this case but merely illustrates the need for fact-finding and consideration by the district court.

3. State's Interest in Increasing Minority Representation on the Bench

Moreover, Florida has expressed a strong state interest in diversifying the complexion of its judicial officers. *See* Florida Supreme Court Racial and Ethnic Bias Study Commission Report, Volumes I and II (December 11, 1990) ("Commission Report"). For example the Commission Report has recognized that the court "must reflect the complexion, demeanor, and dialect of its workforce." Commission Report, Vol. 1, p. 10. The Commission has also noted that "the current process which provides for circuit-wide at-large elections is not yielding sufficient representation of minorities on Florida's bench." Commission Report, Vol. 1, p. 16-17. Thus, the findings of the Commission Report demonstrate the necessity of remanding this case to the district court to carefully develop and clarify the competing state interests involved in the current litigation.[11]

III. Conclusion

In summary, the opinion is flawed in two fundamental respects. First, two judges introduce a new racial bias hurdle which Congress plainly rejected in its recent amendment to the Voting Rights Act. In erecting this

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[11] The Florida Bar and the Florida legislature have simply watched this litigation without attempting to design a plan that will allow Florida's minority voters to elect the judicial officers of their choice. Through inaction, the leaders of Florida's judicial concerns are leaving several federal judges the task of designing court systems on a circuit-by-circuit basis. Florida must have a uniform court system that conforms to constitutional and Voting Rights Act mandates. Instead of continuing as a model for the nation, the Florida court system, through multiple federal court decrees, will become a senseless hodge-podge of arrangements varying from circuit to circuit. Florida officials need to act on the problem discussed in this litigation—now!

hurdle, the judges misconstrue Supreme Court precedent, the plain text, and the legislative history of the Act. Fortunately, the *en banc* court does not embrace this approach.

Second, the majority inappropriately embarks on an analysis and rejection of any and all remedies the appellants and the district court could conceive to redress their claim for vote dilution. To dispose of appellants' proposed remedies, the majority essentially concludes that the "only benefit black voters could legitimately expect from a court order implementing one of the appellants' proposed remedies ... is the *perception* that the challenged circuit and county judicial systems are colorblind." (Emphasis added.) The majority concludes that the disruption of the current system will create the impression that each racial group has its own particular judges to hear its claims. These criticis misconstrue the thrust of voting rights litigation. Judicial election lawsuits do not center on the concern that sitting judges are prejudiced one way and should be replaced by judges prejudiced in a different direction. *See* Brenda Wright, *Symposium: The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections,* 19 Fla.St.U.L.Rev. 669, 686-89 (1992). As one commentator succinctly stated, the true concern is that "elected judges wield important governmental powers, and minorities wish to have some meaningful opportunity to participate in choosing who will exercise those powers. Fairness in voting procedures is crucial even though most citizens, whether black or white, will never appear as litigants before the judges for whom they vote." *Id.*

Thus, balancing the state's relative concerns in maintaining its current judicial structure and diversifying its judiciary should be left to the versatile fact-finding process of the district court.

Accordingly, I respectfully dissent from the majority's determination that the state's interest in maintaining a

linkage between the jurisdictional and electoral bases of the judiciary precludes the consideration of possible remedies by the district court, thus obviating the necessity of remand to the district court for fact-finding. I also dissent from the position urged by two judges that a plaintiff class must show racial bias in the community in order to prevail in a section 2 Voting Rights Act claim.

APPENDIX B

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 92-2588.

Jesse L. NIPPER; Donald A. Carter; Annie Ruth Williams; Selendra Williams; Katrina Miles; Desi Wayne Dunlap; Carol D. Days; Anthony Days, and D.W. Perkins Bar Association,

Plaintiffs-Appellants,

v.

Jim SMITH; Dot Joyce, Director of the Florida Division of Elections; Tommie R. Bell, Supervisor of Elections in Duval County; and Lawton Chiles, Governor,

Defendants-Appellees.

OPINION

Sept. 15, 1993

Appeal from the United States District Court for the Middle District of Florida.

DISTRICT/BKRPTCY COURT DKT# 90-447-CIV-J-16.
DISTRICT JUDGE MOORE, II

COUNSEL:

For Plaintiffs-Appellants:

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For Defendants-Appellees:

George L. Wass, Department of Legal Affairs, Tallahassee, FL., Harry F. Chiles, Dena Dean, Frank E. Brown, Asst. Atty. Gen., Leonard S. Magid, Jacksonville, FL., Mitchell D. Franks, Lakeland, FL.

For USA, AMICUS:

Rebecca K. Troth, DOJ, Civil Rights Division, Appellate Section, Washington, D.C. Howard C. Coker, COKER, MYERS, SCHICKEL, COOPER & SORENSON, Jacksonville, Florida.

Before KRAVITCH and HATCHETT, Circuit Judges, and ATKINS,* Senior District Judge.

ATKINS, Senior District Judge:

The plaintiffs/appellants are (1) Jesse L. Nipper, Donald A. Carter, Annie Ruth Williams, Selendra Williams, Katrina Miles, Desi Wayne Dunlap, Carol D. Days, and Anthony Days, black adult citizens of the United States and residents and registered voters of Duval County, Florida, and the Fourth Judicial Circuit, and (2) D.W. Perkins Bar Association, an unincorporated association of black attorneys in Duval County, Florida. They appeal from the judgment entered against them by the district court, following entry of an order finding that appellants failed to establish a violation of their

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

rights under the Fourteenth and Fifteenth Amendments of the United States Constitution and section 2 of the Voting Rights Act, 42 U.S.C. § 1973. 795 F. Supp. 1525. Appellants challenge the method of at-large circuit wide and county wide election of judges to the Fourth Judicial Circuit Court of Florida and the Duval County Court. While appellants disagree with the district court's ruling on the constitutional issue, they seek only a review of the ruling on the section 2 claim. Appellants' Brief at 2. For the reasons discussed below, we find that the district court erred in holding (a) that appellants failed to establish the existence of polarized voting and (b) given the presence of the Gingles threshold factors, that the appellees discharged their burden of defeating a section 2 claim, in terms of the totality of circumstances. Accordingly, we REVERSE AND REMAND.

I. BACKGROUND [1]

Duval County's population is 24.47 black and the population of the Fourth Judicial Circuit is 21% black.[2] The twenty-eight judges on the Fourth Judicial Circuit Court are elected circuit wide and the twelve judges on the Duval County Court are elected county wide in these majority white election districts. R6-125-6. The at-large judicial elections for the Fourth Circuit and the Duval County Court are characterized by a majority vote requirement, a numbered-place system, and the use of staggered terms. R6-125-11. The election districts are very large: the Fourth Circuit covers approximately

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[1] In their reply brief, appellants make clear that they do not challenge the district court's factual findings. Rather, they base their appeal "upon the misconceptions of the law that hampered the District Court in addressing the issues of polarized voting and the totality of circumstances." Appellants' Reply Brief at 2.

[2] The Fourth Judicial Circuit, located in the northern part of Florida, consists of Duval, Clay and Nassau Counties.

2,017 square miles and contains a 1990 census population of 822,898; Duval County covers approximately 776 square miles and contains a 1990 census population of 672,971. *Id.* at 6. In order to qualify to run for a judgeship, a candidate must pay a filing fee of approximately $4,400 for county court and $5,000 for circuit court, although a candidate can avoid the fee by a petition process with a number of signatures from registered voters. *Id.* at 6-7.

Although the voting age populations of the Fourth Judicial Circuit and Duval County are 197 and 227 black, respectively, no black candidate has ever won a contested election. Between 1972 and 1990, five black candidates ran for seats on the two courts in six contested elections.[3] As the district court found, each of those election contests was characterized by severe polarized voting, with the majority of black voters choosing the black candidate and the vast majority of white voters supporting the white candidate, resulting in the consistent defeat of the black candidates. R6-125-9-10, 21. For example, Leander Shaw, former Chief Justice of the Florida Supreme Court, advanced to a runoff in the 1972 primary after gaining less than 25% of the white vote but 93% of the black vote in Duval County. However, he lost in the runoff against the white candidate even though Shaw had 98% of the black vote.[4]

Summarizing the analyses of the six elections, the district court stated as follows:

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[3] The elections and black candidates were: (1) 1972 Primary, Circuit Court, Leander Shaw; (2) 1972 Runoff, Circuit Court, Leander Shaw; (3) 1978 Primary, Circuit Court, Harrell Buggs; (4) 1978 Primary, Duval County Court, Alfred Washington; (5) 1984 Primary, Duval County Court, Denise Prescod; and (6) 1984 Primary, Duval County Court, Dietra Micks.

[4] Plaintiffs' expert, Dr. Allan Lichtman, performed ecological regression and extreme case analyses of the six elections. The ecological

> On their face, the voting estimates for the Shaw, Buggs, Washington, Prescod, and Micks elections indicate that voting was racially polarized in those elections. Stated differently, the estimates show that blacks were politically cohesive in those judicial elections, and that the white majority voted sufficiently as a bloc to enable the majority to usually defeat the black minority's preferred candidate. The regression estimates and extreme case analyses show that in these elections, black support for the black candidates ranged from 737 to 987, white support for the black candidate ranged from 37 to 337, black support for the white candidate ranged from 2 to 277, and white support for the white candidate ranged from 677 to 977.

Id. at 21.

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regression analysis revealed the following degrees of polarization in the Fourth Circuit and Duval County:

	% of Black Voters Voting for Black Cand.(s)	% of White Voters Voting for Black Cand.(s)
4th Circuit:		
1972 Primary Leander Shaw		
Circuit	92	24
County	93	23
1972 Runoff Leander Shaw		
Circuit	97	33
County	98	32
1978 Primary Harrell Buggs		
Circuit	82	3
County	81	4
Duval County:		
1978 Primary A. Washington	88	13
1984 Primary Denise Prescod	73	27
1984 Primary Dietra Micks	76	24

See R6-125, Appendix A.

Testimony indicated there would have been additional black candidates but for the apparent futility of running in the existing majority white election districts in the face of such severe white bloc voting. R11-8-14 (testimony of Brian Davis); R10-118-120 (testimony of Judge Henry Adams).

At the time appellants filed this action, only one black judge had ever served on the circuit court and only one on the county court. Both reached office by way of mid-term appointments to vacancies. *Id.* at 14-15, 32-33; R4-64-11. At the time of trial, only one of the twenty-eight circuit judges and two of the twelve county judges were black. *Id.*[5]

Appellants established at trial that an election subdistrict easily could be drawn in the northwest quadrant of Duval County with a 60 percent black voting age majority and with sufficient population to elect six of the twenty-eight circuit court judges and three of the twelve county court judges. R6-125-7, 20; Plaintiffs' Exhibits 4A and 5. Appellants have not contended this would be the only remedy available; rather, they submitted evidence of the subdistrict to demonstrate that a new electoral configuration could increase the ability of black voters to elect candidates of choice. R10-160, 164 (testimony of plaintiffs' expert demographer Jerry Wilson).

As the district court found, Florida has a long history of racial discrimination in elections and in other aspects of life. R6-125-11-12. For example, until 1958, the State of Florida prohibited black citizens from attending the University of Florida College of Law. Florida A & M Law School was created in 1951 for black students, but was

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[5] Before trial, a second black judge was appointed to the county court, R6-125-32-33; R4-84-10-11, but when this case was tried still only one black judge served among the twenty-eight on the circuit court.

not accredited until several years later. When the state opened another law school in Tallahassee in 1967 at Florida State University, it closed Florida A & M Law School. R6-125-12.[6] The district court also found that "black citizens in Florida still suffer in some ways from the effects of Florida's history of purposeful discrimination," particularly in terms of pronounced socio-economic disparities. R6-125-13.

Although the district court noted that certain discriminatory devices, such as poll taxes, are no longer in effect, the court also considered recent evidence of discrimination. Referring to the 1990 report of the Florida Supreme Court Racial and Ethnic Bias Commission,[7] the district court observed: "This Report documented numerous features of Florida's justice system that allegedly have an adverse effect on the dispensation of justice to minority citizens, including the under representation of minorities in the judiciary in comparison to the percentage of minorities in the total population." R6-125-12-13. The Commission reported as follows:

> Clearly, the current election process, which provides for circuit-wide, at-large elections, is not yielding sufficient representation of minorities on Florida's bench. At the same time, the dramatic under representation of minority judges reflected in the above statistics compels the conclusion that the appointive system, as currently structured and implemented, has itself failed to achieve racial and ethnic diversity. The Commission strongly believes that serious measures need to be considered

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[6] Stipulations 30-45 in the pretrial stipulation also recount some of this history of discrimination. R4-64-12-15.

[7] The Florida Supreme Court appointed the Bias Commission, which contained across-section of judges, lawyers, and lay citizens from throughout the state. R10-109 (testimony of Judge Henry Adams, Commission member).

> for implementation—in both systems—which are aimed at producing a more racially and ethnically sensitive judiciary.

Plaintiffs' Exhibit 7 at 16-17. The Commission further recommended that the Florida Legislature study the feasibility of utilizing judicial election subdistricts as a means of redressing prior discrimination and increasing minority representation on the bench. Plaintiffs' Exhibit 7 at xii.[8] In addition, the Commission issued a subsequent report on December 11, 1991, which stated the following:

> The under representation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies or individual practices, unfair and insensitive to individuals of color in the ways described in the Commission's first report.... By threatening the withdrawal of the tacit "consent of the governed," the under representation of minorities in positions of responsibility in the judicial system weakens the very system of ordered liberty upon which our democracy is based.

Plaintiffs' Exhibit 15 at vii-viii; R10-114-115.

The district court also weighed evidence of black and white political participation, finding little disparity between black and white voter registration in the Fourth Judicial Circuit and Duval County. However, the evidence also showed that black voter turnout in judicial elections was lower than that of whites.[9]

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[8] Judge Henry Adams, a Commission member, testified that the Commission unanimously concurred in these findings and recommendations. R10-112.

[9] The analysis of plaintiffs' expert, Dr. Allan Lichtman, showed consistently lower participation by black registered voters than white registered voters in the black-white circuit and county court elections. Plaintiffs' Exhibit 13.

The district court also relied on elections involving only white candidates, finding that black voters' candidate of choice won 687 of the thirteen contested circuit court elections and 587 of the fourteen contested county court elections held during the 1972-90 period.

In addition to evidence of voting statistics, the parties presented evidence on the issue of the "state interests" that the defendants suggested would be compromised if a subdistricting remedy were imposed. The defendants' primary witness on this point was then-chief judge of the Fourth Judicial Circuit, John Santora. Judge Santora testified that subdistricting would cause elected judges to hear cases involving one litigant from inside their district and one from outside. However, he acknowledged that the present system frequently involves litigants from outside the election district facing those from inside the district. Moreover, Judge Santora testified that judges in the Fourth Circuit and elsewhere are fair and impartial even when such situations arise. R13-198-199. Judge Henry Adams of the Fourth Circuit also testified that litigants from outside the election district frequently oppose litigants from inside the district under the current system, and that judges nevertheless are able to exercise their duties fairly and impartially. R15-5-7.

The appellants presented the testimony of Judge Robert Gibbs, a black judge elected from a Mississippi subdistrict of approximately 75,000 people, and Spencer Gilbert, a white Mississippi lawyer practicing in a jurisdiction that uses subdistricts. Both testified that subdistricting has not harmed the administration or perception of justice in that state and, if anything, has actually improved the administration and perception of justice. R15-16-33 and R15-45-51.

The reports of the Florida Supreme Court Racial and Ethnic Bias Commission stated that elimination of discrimination in judicial elections would actually enhance the state's interests, as would increasing the number of

black judges. Plaintiffs' Exhibit 7 at xii, 16-17; Plaintiffs' Exhibit 15 at vii and xxiv.

As noted, based on the evidence presented at trial, the district judge found "that blacks are a sufficiently large and geographically compact group to constitute a majority in a subdistrict." R6-125-20. Additionally, he conceded that the statistics before him "ordinarily make out a sufficient showing of racial polarization in these six judicial elections." R6-125-21. Despite these findings, the district judge ruled against the appellants on the critical issue of polarized voting. Alternatively, the district court held that even if appellants had established racially polarized voting, no section 2 violation existed because the "voting community is not driven by racial bias." R6-125-28.

II. STANDARD OF REVIEW

We review the district court's findings of fact for clear error, *Thornburg v. Gingles*, 478 U.S. 30, 78-79, 106 S. Ct. 2752, 2780-81, 92 L. Ed. 2d 25 (1986), affording special deference to the district court due to its "special vantage point" and ability to conduct an "intensely local appraisal of the design and impact of" a voting system. *White v. Regester*, 412 U.S. 755, 769, 93 S. Ct.2332, 2341, 37 L. Ed. 2d 314 (1973). However, this standard does not affect this court's power to correct errors of law or findings of fact predicated on a misunderstanding of the law. *See Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781 (citations omitted); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1554 (11th Cir.1987), *cert. denied, Duncan v. Carrollton*, 485 U.S. 936, 108 S. Ct. 1111, 99 L. Ed. 2d 272 (1988).

III. OVERVIEW OF SECTION 2 OF THE VOTING RIGHTS ACT

To prevail on a claim of vote dilution under section 2 of the Voting Rights Act,[10] appellants must meet certain

threshold requirements which the United States Supreme Court first identified in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). Under *Gingles*, appellants must establish (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that the minority group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to cause it usually to defeat the minority's preferred candidate. 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

In addition to the three core requirements, the *Gingles* Court identified other factors which might be considered as part of the "totality of the circumstances" that would support a section 2 claim:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

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[10]Section 2 of the Voting Rights Act, as amended, provides as follows: (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section. (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection(a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in number sequel to their proportion in the population. 42 U.S.C. § 1973.

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36-37, 106 S. Ct. at 2759 (quoting S. Rep. No. 417, 97th Cong., 2d Sess.28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07). Additional factors which may be probative in some cases are:

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group, and

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 37, 106 S. Ct. at 2759.

The *Gingles* Court noted that "this list of factors is neither comprehensive nor exclusive." *Id.* at 45, 106 S. Ct. at 2763. However, evidence of racially polarized voting has been recognized as "the linchpin of a section 2 vote dilution claim," and is relevant to establishing two of the three threshold *Gingles* requirements: the political cohesiveness of the minority group and the ability of the white majority usually to defeat the minority's preferred candidate. *Citizens For a Better Gretna v. Gretna*, 834 F.2d 496, 499 (5th Cir.1987), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213, 106 L. Ed. 2d 564 (1989). Thus, although certain Senate Report factors, such as racially polarized voting, are more significant because of their direct bearing on the section 2 threshold inquiry, other factors are "supportive of, but not essential to, a minority voter's claim." *Hall v. Holder*, 955 F.2d 1563, 1568 (11th Cir.1992) (quoting *Gingles*, 478 U.S. at 48-49 & n. 15, 106 S. Ct. at 2765-66 & n. 15). These factors are relevant to the extent that they are supportive of the three core *Gingles* factors, however, they need not be present to satisfy the *Gingles* test. *Hall*, 955 F.2d at 1568.[11]

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[11] We note that this circuit is divided on the questions of whether plaintiffs can establish a section 2 violation by proving the threshold *Gingles* factors, *see Solomon v. Liberty County*, 899 F.2d 1012, 1017 (11th Cir.1990) (en banc) (per curiam) (Kravitch, J., specially concurring), and whether defendants can thereafter raise a defense under the totality of the circumstances. *Id.* at 1033 (Tjoflat, C.J., specially concurring); *see Hall v. Holder*, 955 F.2d 1563,1568 n. 9 (11th Cir.1992) (recognizing division).

IV. DISCUSSION

This appeal centers on two issues. First, appellants challenge the district court's conclusion that they failed to prove the existence of racially polarized voting patterns in the Fourth Circuit and Duval County. Second, appellants challenge the district court's holding that, even if appellants did show racially polarized voting, the "totality of the circumstances" did not support a section 2 claim. We address each of these contentions below.

A. *Racially Polarized Voting*

As discussed above, both parties presented substantial evidence related to the degree of racial polarization in judicial elections in the Fourth Judicial Circuit and Duval County. Based on this evidence, the district judge acknowledged that the statistics before him ordinarily would establish racial polarization but nevertheless ruled that appellants failed to prove this critical factor. In so ruling, the district court gave the following reasons: (1) the judicial elections involving black candidates were stale; (2) black voters occasionally elected candidates of choice in elections involving only white candidates; and (3) two of the black-white elections involved incumbents. We now consider each of the district court's grounds for ruling against appellants on the issue of racial polarization.

1. Staleness of Elections

The district court's decision to discount the probative value of the six elections, which took place between 1972 and 1984, because four of those elections were "stale" was incorrect for two reasons. First, this ruling is contrary to precedent in this circuit as well as other circuits. *See, e.g., Solomon v. Liberty County,* 899 F.2d 1012 (11th Cir.1990) (*en banc*), *cert. denied,* 498 U.S. 1023, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991); *Gretna,* 834 F.2d at 500-03. In *Solomon,* six elections for county

offices in the time period 1968-1984 were held sufficient to establish polarized voting as a matter of law. *Solomon*, 899 F.2d at 1013 and 1019-21 and n. 8 (Kravitch, J., specially concurring); *Solomon*, 899 F.2d at 1021 (Tjoflat, C.J., specially concurring). Likewise, the Fifth Circuit in *Gretna*, a 1987 decision, held that plaintiffs had shown polarization in a city wide at-large challenge based on two aldermanic elections occurring in 1977 and 1979 and two exogenous elections occurring in 1979 and 1984. *Gretna*, 834 F.2d at 501-02; *see also Gingles*, 478 U.S. at 82, 106 S. Ct. at 2782-83 (Court relied upon elections occurring in ten year period before the suit was filed). Moreover, appellees' own expert, Dr. Ronald Weber, conceded that black-white elections from 1972 are "recent enough to be probative of current voting patterns." R13-61-62.

Second, the district court, in effect, penalized appellants because black candidates have not run in judicial elections in the recent past. At least two witnesses, Brian Davis and Judge Henry Adams, offered credible reasons for this reluctance—the futility of running in the face of pervasive bloc-voting and the resulting pattern of black defeat in prior years. R11-12-16 and R10-117-118.

Courts have refused to deny section 2 relief simply because there are few or no elections in which minority candidates have run. *See McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir.1984). The *McMillan* court explained that "the fact that no black ran [for office] between 1970 and the time this litigation commenced [is of no help] to defendants." Rather, "the lack of black candidates is a likely result of the discriminatory system." *Id.* Also instructive on this issue is the recital in *Gingles* where the Supreme Court said: "Where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." *Gingles*, 478 U.S. at 57 n. 25, 106 S. Ct.

at 2769 n. 25; *see also, Westwego Citizens for Better Government v. Westwego (Westwego I)*, 872 F.2d 1201, 1208-09 and n. 9 (5th Cir.1989) (holding that plaintiffs could establish a section 2 violation even though there were no statistics available related to Westwego aldermanic elections involving black candidates because no black had ever run).

As the Fifth Circuit warned in *Westwego I*, the failure to consider the possibility that "black candidates 'don't run because they can't win' " in weighing such evidence "would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Westwego I*, 872 F.2d at 1209 n. 9. Thus, in keeping with the teachings of *Gingles*, *McMillan*, and *Westwego I*, we hold that the district court erred in discounting the probative value of the six judicial elections on the basis of "staleness."

2. Elections Involving Only White Candidates

Based upon its erroneous conclusion that the judicial elections involving black candidates were stale, the district court decided to "give some weight to all elections for circuit and county judge from 1972 to 1990 ... in determining racial polarization, regardless of the race of the candidates." R6-125-23. Thus, in holding against appellants on the issue of racial polarization, the district court relied primarily on elections involving only white candidates, concluding that "when judicial elections not involving black candidates are included in the analysis, the black candidate of choice for circuit or county judge wins the majority of the time." *Id.* at 25.

The genesis of the district court's approach was the plurality comment by the Supreme Court in *Gingles* that "the race of the candidate *per se* is irrelevant to racial bloc voting analysis." *Gingles*, 478 U.S. at 67, 106 S. Ct. at 2775. However, when viewed in the context of facts before the *Gingles* Court [12] and the subsequent holdings

of other courts called upon to interpret the practical meaning of *Gingles*, it is clear that a consistent showing of polarization involving black and white candidates cannot be rebutted by evidence that black voters' candidates of choice sometimes win when only white candidates are running. As the court noted in *Westwego I*, "the evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates." 872 F.2d at 1208 n. 7. *See also, id.* ("*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers the choice of supporting a viable minority candidate.")(quoting *Gretna*, 834 F.2d at 503); *Campos v. Baytown*, 840 F.2d 1240, 1245 (5th Cir.1988) (rejecting argument that any time candidate gets majority of minority votes he is the minority group's "chosen representative," especially where there was no evidence that any Anglo-Anglo race offered voters choice of "viable minority candidate"); *Davis v. Chiles*, No. TCA 90-40098 MMP (N.D.Fla., Sept. 3, 1991 (slip op. at 19-20) (holding that evidence from white-white elections could not rebut showing of polarization in black-white elections). Indeed, appellees' own expert admitted on cross-examination that black-white elections are more probative than elections involving only white candidates if they provide contrary evidence. R13-48 (cross-examination of Dr. Ronald Weber). Here, unlike the white-white judicial elections relied upon by the district court, the black-white elections show that black voters have less opportunity to elect candidates of choice than white voters.

Furthermore, the district court's focus on elections involving only white candidates runs counter to this

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[12] In *Gingles*, the only elections analyzed were elections in which black candidates ran against white candidates.

court's holding in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir.1987). There, the district court criticized plaintiffs' expert for not analyzing two white versus white sheriff's races in which one of the candidates had a black deputy sheriff who assisted the white candidate in getting elected. In rejecting the district court's holding, this court wrote: "It is the access of minority voters to the political process, not the majority's access to the black vote, which is the chief concern of Section 2 of the Voting Rights Act." *Carrollton*, 829 F.2d at 1559.

In sum, given the pervasive polarization in the elections involving black and white candidates, we hold that the district court erred in relying on elections involving only white candidates. Under these circumstances, evidence that black voters are sometimes able to elect candidates of choice in white only elections was an insufficient basis to find against appellants on the issue of racial polarization.

3. Incumbency

The district court also rejected two of the judicial elections in which black candidates lost as evidence of racial polarization because the black candidates, Buggs and Prescod, ran against incumbents. The court explained its ruling as follows:

> Most importantly, special circumstances in several of the judicial elections involving black candidates are damaging to Plaintiffs' attempt to prove racial polarization. In *Gingles*, the Supreme Court stated that minority electoral *success* does not foreclose a vote dilution claim if that success can be explained by special circumstances, such as the minority candidate running unopposed, or the fact that the minority ran as an incumbent. *See Gingles*, 478 U.S. at 57, 106 S. Ct. at 2770. The converse of this proposition must also be true. That is, any balanced considera-

> tion of a vote dilution claim should also take into account any special circumstances that may explain minority electoral *failure* in a polarized contest. In particular, the same special circumstances identified by the *Gingles* Court to explain minority success—incumbency and the absence of an opponent—should be considered in analyzing elections in which minority candidates have been defeated.

R6-125-25. Thus, the district court concluded that the Buggs and Prescod elections "[were] better viewed as evidence of the power of incumbency rather than as strong evidence of racial polarization." *Id.* at 26. For the reasons that follow, we conclude that the district court erred in discrediting the value of these elections as evidence of racial polarization.

First, the district judge erred in giving substantial weight to the white incumbencies as an explanation for the outcomes of the Buggs and Prescod elections given the relative weakness of the incumbents in those elections. For example, the white incumbent against whom Prescod ran in 1984 was not an attorney, a prerequisite for running for county judge in that election; rather, he was "grandfathered" in from an earlier time when non-attorneys were permitted to run for county judgeships. More significantly, the incumbent in the Prescod race received the worst ratings in the bar polls of any judge in the circuit, including an "unqualified" rating from 827 of the lawyers polled in the year he defeated Prescod. Furthermore, Jacksonville's only daily newspaper and a racially integrated public teacher's organization both endorsed Prescod. In the 1978 Buggs election, the white incumbent, who had been appointed to a vacancy, had been an incumbent judge for a mere 100 days before running against Buggs. In short, contrary to the district court's conclusion, these elections are hardly "evidence of the power of incumbency."

Second, even aside from the relative weakness of the white incumbents, the single factor of incumbency is insufficient to explain the defeat of black candidates where the evidence shows that black candidates consistently lost because of white bloc voting. In *Gingles*, the Court explained that

> in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as ...incumbency, ... may explain minority electoral success in a polarized contest.

Gingles, 478 U.S. at 57, 106 S. Ct. at 2770 (emphasis added, footnote omitted). We interpret *Gingles* to permit consideration of special circumstances only to explain variations from a usual pattern of racially polarized voting. In other words, special circumstances may explain minority electoral success in a polarized election; however, contrary to the district court's interpretation, the converse is not also true. As one court has explained, "the 'special circumstances' the [*Gingles*] Court had in mind were circumstances that would explain the minority candidates winning the election in spite of white bloc voting. Plaintiffs' argument turns the Court's language on its head and would have it refer to circumstances explaining the *defeat* of the minority's candidate...." *Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1329(N.D.Ill.1989). As in *Williams*, we conclude that the district court erred in construing *Gingles* to permit consideration of special circumstances to explain minority electoral failure.

In sum, we respectfully reject as clear error each of the district court's reasons for concluding that appellants

failed to show racial polarization.[18] Accordingly, we hold that the evidence in the entire record demonstrates racially polarized voting in the Fourth Judicial Circuit and Duval County.

B. *Violation of Section 2 under "Totality of the Circumstances"*

Having concluded that the district court erred in finding against appellants on the issue of racial polarization, we next consider appellants' contention that the district court erred in holding that, assuming racial polarization exists, appellants failed to establish a section 2 violation.

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[18] We also reject the district court's "applicant pool" analysis with respect to the number of black elected judges. The district court focused upon the low number of black attorneys who would be eligible for judicial candidacies. However, the appropriate comparison is the percentage of black citizens or black voters, not the percentage of black lawyers. As the Florida Supreme Court Racial and Ethnic Bias Commission observed:

> A comparison of minority judges to the estimated eligible minority population alone is not responsive to the question of whether the Florida judiciary adequately reflects the racial and ethnic diversity of the citizens of Florida. One way of determining reflectiveness is to examine population proportional representation. That is, whether the number of minority judges reflects proportionately the number of minorities of the general population. A population proportional analysis reveals that minority judges are significantly under represented [in proportion] to the general population.

R10-147-48; Defendant's Exhibit 23 at 15 (emphasis added).

Moreover, courts have rejected defenses based on an "applicant pool" theory. As the former Fifth Circuit stated, "the necessary link between the percentage of those eligible and the percentage actually selected that exists in school cases and employment cases is missing in voting cases." *Marshall v. Edwards*, 582 F.2d 927, 936 (5th Cir.1978); *see also Martin v. Allain*, 658 F. Supp. 1183,1203-04 (S.D.Miss.1987) (finding fact that small percentage of blacks was eligible to be elected as judges relevant but not controlling and further holding that existence of sufficiently large and geographically compact group which could constitute majority in single-member district was over riding factor).

Following Judge Tjoflat's concurrence in *Solomon*, 899 F.2d at 1035, the district court stated that it still would have ruled for appellees because, under the totality of the circumstances, "the voting community is not driven by racial bias." R6-125-28. The court explained its ruling as follows:

> Specifically, Defendants have proved that there are legitimate state interests in maintaining the current system, that eligible blacks have achieved more than proportional representation on the circuit and county courts, that no racial appeals or candidate slating processes have been used to exclude black voters or candidates from the electoral process, that the current circuit or county judges are responsive to the needs of all citizens, and that Florida's history of discrimination and the lingering effects thereof do not have a material current impact on black voters' ability to participate in the political process.

Id. at 38.

In challenging this ruling, appellants maintain that, assuming the district court is reversed on the issue of polarization, the view articulated in *Solomon* by Judge Kravitch dictates judgment in their favor. *Solomon*, 899 F.2d at 1021(Kravitch, J., specially concurring). However, as stated, this circuit remains divided on the issue raised in *Solomon*, that is, whether plaintiffs can establish a section 2 violation simply by satisfying the three core *Gingles* factors or whether defendants can raise a lack of racial bias defense under the totality of circumstances after plaintiffs have satisfied the threshold *Gingles* factors.[14] We do not resolve that question today because we find that appellants have established a section 2 violation under either approach. Based on the district court's findings and our determination that appellants established racially polarized voting, we agree that appellants have met the three threshold *Gingles* requirements. In addition, for the reasons discussed

below, we reject the district court's determination that the appellees showed an absence of racial bias.

According to Judge Tjoflat's concurrence, a plaintiff's satisfaction of the *Gingles* factors shifts the burden to the defendant to show that "in light of the totality of the circumstances, ... the voting communities were not driven by racial bias." *Solomon*, 899 F.2d at 1037. In finding that defendants had shown an absence of racial bias, the district court relied upon factors indicating that the legislature had no discriminatory purpose in adopting and maintaining the existing election districts. R6-125-28-37. For example, the court noted that the state has an interest in fostering an independent and stable judiciary. In addition, the district court relied on the fact that three black judges had been appointed over the years as evidence of minority electoral success. While these factors may support a finding that the state had "legitimate interests" in maintaining the existing election districts and that the appointing authorities were not driven by racial bias, they show nothing about the motivation of the voting communities.

The critical inquiry under the racial bias approach is whether racial bias motivates the *voting community*, not whether it influences the legislature in appointing judges. See *Solomon*, 899 F.2d at 1037; *see also Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1487 (11th Cir.1993) (per curiam) (discussing racial bias in voting communities). Section 2 refers to the ability of black voters to *elect* their candidates of choice, not to the ability of black candidates to be appointed to office. *Carrollton Branch of NAACP*, 829 F.2d at 1560 ("While appointments ... may be evidence of the willingness of some whites to allow some black participation in the political process, it does not demonstrate the ability of

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[14] *See* supra note 11.

blacks to get elected to political office...."). We therefore hold that the district erred in relying upon evidence indicating that the legislature, as opposed to the voting community, was not driven by racial bias.

Furthermore, as discussed above,[15] we also reject the district court's appraisal of minority electoral "success" in obtaining representation on the judiciary based on a comparison of the number of black judges to the low number of black attorneys eligible for judgeships. As the Florida Supreme Court Racial and Ethnic Bias Commission's commented: "A comparison of minority judges to the estimated eligible minority population alone is not responsive to the question of whether the Florida judiciary adequately reflects the racial and ethnic diversity of the citizens of Florida." Defendants' Exhibit 23 at 15. In finding minority electoral success based on a percentage of black lawyers, the district court improperly discounted the evidence of Florida's history of racial discrimination and the exclusion of black citizens from access to legal education in the state. Thus, the appropriate comparison is the percentage of black citizens or black voters, not the percentage of black lawyers.

Additionally, based on our review of the record, we conclude that the district court erred in ruling that Florida's history of official discrimination, along with the other Senate Report factors—the socio-economic effects of discrimination, the responsiveness of judges to the needs of the local black community, and the absence of candidate slating processes and the use of racial appeals—did not support a finding of racial bias motivating voting in the relevant communities. After recounting the long history of discrimination and the exceedingly difficult economic conditions under which black citizens live as compared to most white citizens in the Fourth Judi-

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[15] *See supra* note 13.

cial Circuit, the district court discredited these factors largely because black voter registration is equal to that of white voter registration. However, as this court has observed, the fact that blacks register in approximately the same numbers as whites does not defeat or detract from a section 2 claim, especially where the evidence shows that black voter turnout is lower than that of whites. *See United States v. Dallas County Commission*, 739 F.2d 1529, 1538 (11th Cir.1984). In addition, this court previously has held that the absence of candidate slating processes and racial appeals is insufficient to defeat a section 2 case. *See United States v. Marengo County Commission*, 731 F.2d 1546, 1571 (11th Cir.), *cert. denied*, 469 U.S. 976, 105 S. Ct. 375, 83 L.Ed. 2d 311 (1984); *see also McMillan v. Escambia County*, 748 F.2d 1037, 1045-47(5th Cir.1984). Similarly, evidence of elected officials' responsiveness to minority needs "does not overcome evidence that minorities are excluded from political participation." *Marengo*, 731 F.2d at 1572.

In short, the district court erred in concluding that these additional factors supported a defense based on the absence of racial bias, especially where the evidence showed the existence of racially polarized voting. This court has recognized that "the surest indication of race-conscious politics is a pattern of racially polarized voting." *Marengo*, 731 F.2d at 1567; *United States v. Dallas County Commission*, 850 F.2d 1433, 1439 (11th Cir.1988), *cert. denied*, 490 U.S. 1030, 109 S. Ct. 1768, 104 L. Ed. 2d 203 (1989) (same); *see also Meek*, 985 F.2d at 1488 (relying heavily upon evidence of racially and ethnically polarized voting in upholding district court's finding that racial bias substantially motivates voting behavior). As stated, no black candidate has ever won a contested judicial election in the Fourth Circuit or Duval County. This has been so even when the black candidates were clearly more qualified and more experienced than the white candidates. We find these circumstances to be compelling proof of racially biased voting. Accord-

ingly, we conclude that the district court erred in ruling that defendants satisfied their burden of showing an absence of racially biased voting in the Fourth Judicial Circuit and Duval County.

V. CONCLUSION

In summary, we hold that the district court erred in finding that appellants did not satisfy the three core *Gingles* factors and in ruling that appellees discharged their burden of proving that the voting communities were not driven by racial bias. Therefore, we REVERSE the district court's judgment and REMAND for the district court to provide forthwith an appropriate remedy to the appellants.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

Case No. 90-447-Civ-J-16

JESSE NIPPER, et al.,

Plaintiffs,

v.

LAWTON CHILES, Governor of Florida, et al.,

Defendants.

ORDER

John H. Moore, II, District Judge

Decided June 2, 1992

For JESSE L. NIPPER, plaintiff:

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For JIM SMITH, defendant:

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For DOT JOYCE, Director of the Florida Division of Elections, defendant:

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For TOMMIE R. BELL, Supervisor of Elections in Duval County, defendant:

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For LAWTON CHILES, Governor, defendant:

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ORDER

JOHN H. MOORE, II, District Judge.

I. Procedural background

This cause is before the Court on the post-trial briefs submitted by the parties. The individual Plaintiffs in this action are certain black residents and registered voters of Duval County, Florida. Plaintiff D.W. Perkins Bar Association is an unincorporated association of black attorneys in Duval County, Florida; most of these attor-

neys are residents of and registered voters in Duval County and the Fourth Judicial Circuit. Defendants are the Governor, the Secretary of State, and the Director of the Florida Division of Elections, all sued in their official capacities only.

Plaintiffs seek injunctive and declaratory relief against the method of at-large circuit wide and countrywide voting for judges of the Fourth Judicial Circuit and the Duval County Court. Plaintiffs allege that the current at-large system of election unlawfully dilutes the voting strength of black citizens and denies them an equal opportunity to participate in the political process and elect candidates of their choice, in violation of section two of the Voting Rights Act, 42 U.S.C. § 1973. Plaintiffs also allege that the maintenance of the at-large election system violates the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Based on the entire record, the Court makes the following findings of fact and conclusions of law.

II. Overview of Legal Standards

Section 2(a) of the Voting Rights Act prohibits states and their political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen on account of race or color. Section 2(b) provides that:

> a violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have

been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

The United States Supreme Court had occasion to interpret section two in *Thornburg v. Gingles,* 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). The *Gingles* Court set forth the following factors, taken from the Senate Report accompanying the 1982 amendment to the Act, which are to be considered in evaluating a section two claim:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of a minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been ejected to public office in the jurisdiction;

8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. 478 U.S. at 36-37, 44-45, 106 S. Ct. at 2759-60, 2763 (quoting S. Rep. No.97-417, 97th Cong. 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206-07) (hereinafter "S. Rep."). According to the *Gingles* Court, the most important factors to be considered are racial bloc voting and minority electoral success. *Id.* 478 U.S. at 48 n.15, 106 S. Ct. at 2765 n.15. This list of factors is not exhaustive; other relevant factors may also be considered. *Id.* 478 U.S. at 45, 106 S. Ct. at 2763. According to the Senate Report, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or another." S. Rep. at 29. These factors should be considered under a "functional" view of the political process, with a "searching practical evaluation of the past and present reality." *Gingles* 478 U.S. at 45, 106 S. Ct. at 2764.

The *Gingles* Court identified three circumstances which must be present to make out a claim of vote dilution. *Id.* 478 U.S. at 48, 106 S. Ct. at 2765. First, the minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *Id.* 478 U.S. at 50, 106 S. Ct. at 2766. Second, the minority group must show that it is politically cohesive. *Id.* 478 U.S. at 51, 106 S. Ct. at 2766.

Finally, the minority group must demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, in the absence of special circumstances such as incumbency and lack of opposition. *Id.* 478 U.S. at 51, 106 S. Ct. at 2766-67. The Court stressed that these three factors are "necessary preconditions" to a successful claim of vote dilution by an at-large scheme. *Id.* 478 U.S. at 50, 106 S. Ct. at 2766.

The Eleventh Circuit Court of Appeals has been unable to agree on the precise meaning of *Gingles.* In *Solomon v. Liberty County,* 899 F.2d 1012 (11th Cir.1990), a case which presented an opportunity to interpret the proper scope of *Gingles,* the Eleventh Circuit split evenly in an *en banc* decision. Judge Kravitch, writing for five judges, wrote that a plaintiff can prove vote dilution simply by showing the ability to elect a black candidate from a singlemember district and racial bloc voting that operates usually to defeat the black candidate in an at-large system. *See Solomon,* 899 F.2d at 1017. Judge Kravitch only considered the remaining factors set forth in the Senate Report and cited and relied upon by the *Gingles* Court to the extent that those factors shed light on the threshold factors. See id. at 1019; *but cf. Gingles,* 478 U.S. at 80, 106S. Ct. at 2781 (approving the district court's discussion of the "totality of the circumstances," including Senate Report factors such as past discrimination in voting, and campaign appeals to racial prejudice).

Judge Tjoflat, writing for five judges, interpreted *Gingles* to require the following. First, if a plaintiff cannot prove the existence of a large and compact minority group, and racial bloc voting that usually works to defeat the minority group's preferred candidate, then the plaintiff cannot make out a claim of section two vote dilution. *See Solomon,* 899 F.2d at 1035. Second, if the plaintiff does prove the above factors, defendant may rebut the plaintiff's case by offering proof of other

objective factors that, under the totality of the circumstances, indicate that the voting community is not driven by racial bias. *Id.* The ultimate issue to be decided is " 'whether the political processes were equally open' " under the totality of the circumstances. *Id.* at 1036 (quoting S. Rep. at 35, 1982 U.S.C.C.A.N. at p. 213).[1]

Recently, the Supreme Court held that section two applies to the election of trial judges. *See Houston Lawyers' Assoc. v. Attorney General,* 115 L. Ed. 2d 379, 111 S. Ct. 2376 (1991). The Court further held that a state's interest in maintaining the link between a trial judge's jurisdiction and the area of residency of his or her voters is a legitimate factor to be considered by courts in determining whether a section two violation has occurred under the totality of the circumstances. *See id.* at 2381; *see also* S. Rep. at 28-29 (stating that the tenuousness of the state policy behind the electoral system under challenge is a factor to be considered under the totality of the circumstances). The Supreme Court had no occasion in *Houston Lawyers* or its companion case, *Chisom v. Roemer,* 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991), to explain or refine the standard that should be applied in section two litigation. *See Chisom,* 111 S.Ct. at 2368. However, the Supreme Court's recognition of a state's interest as a legitimate factor to be considered reaffirms the notion that a vote dilution claim

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[1] The Eleventh Circuit remains divided on the proper interpretation of *Gingles*, and specifically on the issues of whether plaintiffs can make out a section two violation simply by establishing the *Gingles* factors and whether defendants can raise a defense under the totality of the circumstances after the plaintiffs have satisfied the *Gingles* preconditions. *See Hall v. Holder*, 955 F.2d 1563, 1568 n.9 (11th Cir. 1992).

ultimately must be evaluated under the totality of the circumstances.

III. Findings of Fact
Background

The Fourth Judicial Circuit is located in northeast Florida and consists of Duval, Clay, and Nassau Counties. The circuit covers approximately 2,017 square miles, while Duval County covers approximately 776 square miles. According to the 1990 census, the total population of the Fourth Judicial Circuit is 822,898, and the black population is 173,937, approximately 21% of the total. In Duval County, the total population is 672,971, and the black population is 163,902, approximately 24.4% of the total.

The Fourth Judicial Circuit has twenty-eight circuit judges. The Duval County Court has twelve judges. Circuit judges serve six-year terms, and county judges serve four-year terms. Appointees to mid-term vacancies to circuit and county judgeships initially serve a shorter term which varies depending upon the date of the appointment and the next general election. The circuit and county courts are trial courts, with the circuit courts having general jurisdiction of civil and criminal cases and the county court having limited jurisdiction. Each circuit judge has jurisdiction or authority within the entire circuit. Similarly, each judge of the Duval County Court has jurisdiction or authority within the entire county.

The next regularly scheduled elections for circuit judges in the Fourth Circuit and county judges in Duval County are in September of 1992. The judges on these courts are elected at-large in circuit wide or countywide non-partisan elections. There is no residency requirement other than residency within the circuit or county. A majority vote requirement applies to judicial elections, so that if the leading candidate fails to garner a majority

in the primary, he or she must participate in a runoff against the next highest vote-getter in the general election. Candidates must run for designated seats on the court, and must pay a candidate qualifying fee of five and one-half percent of the annual salary of the office. *See* Fla. Stat. § 105.031 (Supp. 1992). This qualifying fee amounts to approximately $ 5,000 for circuit court positions and approximately $4,400 for county court positions based on current salaries. A petition process also exists whereby a candidate may avoid paying the qualifying fee by obtaining a sufficient number of signatures from qualified persons. *See* Fla. Stat. § 105.035. Candidates for circuit and county judge run in a non-partisan primary.

A. Ability to draw a majority black subdistrict

Plaintiffs allege that a subdistrict containing a black voting age population majority can be created within the Fourth Judicial Circuit and Duval County. Plaintiffs' expert demographer, Jerry Wilson, has drawn a subdistrict that is 60.09% black in voting age population and that Plaintiffs allege could be used to elect six of the twenty-eight judges in a circuit court subdistricting plan, and three of the twelve judges in a county court subdistricting plan. Defendants did not present testimony by a demographer concerning the ability to draw a black majority subdistrict.

B. Racially Polarized Voting

To establish racial polarization in circuit and county judicial elections, both sides offered expert testimony and statistical evidence. Plaintiffs offered the testimony of Dr. Allan Lichtman, Professor of History at the American University, Washington, D.C. Dr. Lichtman studied the six circuit and county judicial elections in

which black candidates have competed against white candidates since 1972. Dr. Lichtman did not analyze any circuit or county judicial elections in which only white candidates were involved.

Dr. Lichtman also chose to analyze numerous elections for offices not a tissue in this litigation ("exogenous" elections) as a means of demonstrating racial polarization in the judicial elections at issue. An election bearing strong similarities to the at-issue elections was Joseph Hatchett's 1976 election to the Florida Supreme Court. Lichtman also included partisan elections such as Jesse Jackson's presidential primaries in 1984 and 1988, Alcee Hastings's various runs for statewide office, and elections for city council and civil service board. All of the non-judicial elections analyzed by Lichtman involved black candidates in competition against white candidates. Almost all of these exogenous elections were of a partisan nature.

Defendants relied on two expert witnesses, Dr. Ronald Weber, Professor of Government at the University of Wisconsin, and Dr. Joan Haworth, former Professor of Economics at Florida State University and currently President of Economic Research Services, Inc. Drs. Weber and Haworth analyzed many of the same elections as Dr. Lichtman, and also examined a substantial number of elections not analyzed by Dr. Lichtman.

Dr. Weber, like Dr. Lichtman, analyzed elections for circuit and county judge between 1972 and 1990. However, whereas Lichtman only considered judicial elections where a black candidate ran for office against one or more white candidates, Weber also considered elections for circuit and county judge in which only white candidates participated. With regard to non-judicial exogenous elections, Weber argued that only those non-judicial elections for low visibility offices similar to judgeships would be of importance in a judicial elections

case. Weber questioned Lichtman's reliance on high visibility elections for statewide or national office such as the presidential primaries participated in by Jesse Jackson in 1984 and 1988.

These experts used the same or similar statistical techniques to analyze the electoral results at issue. Drs. Lichtman, Weber, and Haworth used ecological regression analysis and extreme case analysis to study the voting behavior of the circuit and county electorates. Ecological regression analysis permits estimation of the voting behavior of racial groups through comparison of the racial composition of the population at each precinct to the division of the vote among competing candidates at each precinct. The regression analysis uses data from all of the precincts participating in an election, and produces estimates of the voting behavior of both whites and blacks.[2] Extreme case analysis looks at voting results in precincts that are 90% or more black in voter registration and compares them with the results in precincts that are 90% or more white in voter registration to see if there are differences in the level of support given to candidates of different races in those precincts.

Between 1972 and 1990 there were six contested elections for circuit and county court judgeships in which black candidates ran, involving candidacies for five seats.[3] The elections and black candidates, respectively,

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[2] The experts also calculated two supplemental analyses so as to determine the reliability of the estimates derived from the ecological regression analysis. The "<r>" value, which can range from 0 to 1.0, indicates with a value close to 1.0 that the percentage of the vote cast for the black candidate can be nearly perfectly predicted from the racial composition of a particular political unit. The "statistical significance" value serves a similar purpose—suffice it to say that, in this case, there is little if any disagreement among the experts on the high reliability of the regression estimates for the relevant elections.

were: (1) 1972 Primary, Circuit Court, Leander Shaw; (2) 1972 Runoff, Circuit Court, Leander Shaw; (3) 1978 Primary, Circuit Court, Harrell Buggs; (4) 1978 Primary, Duval County Court, Alfred Washington; (5) 1984 Primary, Duval County Court, Denise Prescod; (6) 1984 Primary, Duval County Court, Dietra Micks. Thus, only two of these elections occurred within six years of the filing of the instant suit, while the remaining four elections are well over a decade old. According to the ecological regression studies,[4] the majority of black voters supported the black candidate in each of these six elections, while the majority of white voters always opted for the white candidate, resulting in the defeat of all the black candidates except for Leander Shaw's win in the 1972 primary. In the six elections, black support for the black candidate ranged from 73% to 98%, white support for the black candidate ranged from 3% to 33%, black support for the white candidate ranged from 2% to 27%, and white support for the white candidate ranged from 67% to 97%.[5] The extreme case analysis shows very similar results in the Shaw, Buggs, Washington, Prescod, and Micks judicial elections.[6]

The Court has also considered results from judicial elections not involving black candidates[7] during the same 1972-1990 period. During this period, there were a total of nineteen contested elections for circuit judge. The two Shaw elections analyzed above and the Buggs election are included in the total of nineteen. The

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[3] In one of the circuit court elections a black candidate, Leander Shaw, ran in the primary and also advanced to the runoff.

[4] With respect to these six elections, the Court adopts Dr. Lichtman's statistical estimates as findings of fact. Dr. Haworth's estimates for the same elections are nearly identical, and equally as credible.

[5] For complete regression estimates on these elections, see Appendix A.

[6] For complete results of the extreme case analysis, see Appendix B.

black candidate of choice won 68% of the contested circuit court elections (thirteen of nineteen elections). Also, during 1972-1990 there were twenty-four contested elections for Duval County Court judge. The Micks, Prescod, and Washington elections are included in the total of twenty-four. The black candidate of choice won 58% of the contested county court elections (fourteen of twenty-four elections). For Dr. Weber's complete statistical analysis of the 1972-1990 circuit and county court elections not involving black candidates, which the Court adopts as findings of fact for statistical purposes only, see Defendants' exhibit 22.

With regard to elections other than for circuit and county judge, the 1976 Florida Supreme Court election involving Joseph Hatchett has the most relevance to the issues in this case. The Hatchett race was a statewide judicial election in which Hatchett ran against a white candidate. Dr. Lichtman's regression estimates, which the Court adopts as findings of fact on this point, show that a majority of white voters in the circuit and in Duval County supported Hatchett's reelection, coupled with virtually unanimous support from black voters.[8]

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[7] The term "black candidate" can be misleading, since it can refer to a candidate who is black or to a candidate who is preferred by a majority of black voters. In this opinion, the term "black candidate" will mean a candidate who is black, whereas the term "black candidate of choice" will refer to a candidate who is preferred by the majority of black voters regardless of the candidate's race.

[8] Dr. Lichtman's report accords the Hatchett election no greater relevance than the 1984 and 1988 presidential primaries involving Jesse Jackson. See Table 3, Plaintiffs' ex. 2, pp. 18-19. The Court rejects this analytical approach. Equating Hatchett's non-partisan, lower profile, judicial election with Rev. Jackson's partisan, high profile, presidential election for the purpose of showing racial polarization in circuit and county judicial elections is misleading.

The expert witnesses also analyzed a number of non-judicial exogenous elections. For regression analysis of Jesse Jackson's 1984 and 1988 presidential primary elections; Shirley Chisholm's 1972 presidential primary election; Alcee Hastings's 1970 U.S. Senate primary election, 1990 Secretary of State primary election, and 1990 Secretary of State runoff election; see Tables 3 and 5 of Dr. Lichtman's report, which the Court adopts as findings of fact. For regression analysis of thirty-four elections including contests for City Council At-large, Civil Services Board, State Representative, Supervisor of Elections, Mayor, and a constitutional amendment, see Dr. Haworth's report at Appendix C and Appendix H, which the Court also adopts as findings of fact. For the reasons set forth in the Conclusions of Law, the Court has accorded little weight to these non-judicial, exogenous elections.

C. Electoral Structure

Judicial elections in the Fourth Judicial Circuit and Duval County are at-large elections, accompanied by a majority vote requirement, a numbered-place system, and the use of staggered terms.

D. History of discrimination in Florida and its current effects on black participation in the political process

Florida has a history of discrimination against black citizens with respect to the franchise. The devices employed by Florida to disfranchise or discriminate against black citizens included: (1) the expungement of black voters from the voting lists in the 1880s; (2) a poll tax, enacted in 1889; (3)a multiple ballot statute, enacted in 1889; (4) the direct primary (also known as the white primary"), adopted in 1901, whereby blacks were excluded from participating in nominating the Democratic Party candidate; and, (5) a requirement that office holders post bonds, adopted in 1885. These laws applied to all elections, including judicial elections.

None of these discriminatory devices are currently in effect in Florida. The poll tax, a facially neutral requirement that applied to all voters, was abolished by the State of Florida in 1939. The multiple ballot requirement was abolished in the 1940s. The direct primary was struck down by the Florida Supreme Court in 1945. The bond posting requirement, which applied to all candidates and had its origins in England, was removed by the 1968 Florida Constitution.

In addition, Florida has a history of discrimination and segregation in other areas. Transportation facilities were segregated until the 1950s. Florida's public schools and facilities were segregated for many years. However, none of the three counties within the Fourth Judicial Circuit have ever been subject to the preclearance provisions of section five of the Voting Rights Act.

Until 1958, Florida refused to permit black citizens to attend the University of Florida College of Law. The law school at Florida A & M, which was created in 1951 as a law school for black students, was not accredited until several years later. Florida A & M's law school was abolished in 1967, one year after the creation of the Florida State University College of Law.

Plaintiffs also introduced a report issued in 1990 by the Florida Supreme Court Racial and Ethnic Bias Study Commission. This Report documented numerous features of Florida's justice system that allegedly have an adverse effect on the dispensation of justice to minority citizens, including the under representation of minorities in the judiciary in comparison to the percentage of minorities in the total population. *See generally* Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission (Dec. 11, 1990).

E. Socio-economic effects of discrimination

Statistical evidence presented in this case indicates that black citizens in Florida still suffer in some ways from the effects of Florida's history of purposeful dis-

crimination. Blacks in the Fourth Judicial Circuit have lower median incomes than whites, and blacks are more likely to have incomes below the poverty level than whites. Blacks have lower rates of high school and college graduation than whites, and are more likely to be unemployed. Blacks also are more likely than whites to live in households without access to a car or telephone, and have lower rates of home ownership and lower home values than whites. Thus, blacks in Florida and the Fourth Circuit are not as well off economically as whites.

Statistics on black and white political participation in Florida and the Fourth Judicial Circuit show little disparity. Specifically, black voting age population is 19.1% of the total voting age population of the Fourth Judicial Circuit. The number of black registered voters is 19.9% of the total number of registered voters in the circuit. Similarly, black voting age population is of the total voting age population of Duval County. The number of black registered voters is 22.7% of the total number of registered voters in the county. Thus, blacks of voting age are registered at higher rates than whites of voting age in both the Fourth Judicial Circuit and Duval County.

Two other statistical measures of black political participation are relevant. First, black voter turnout generally appears to be comparable to white voter turnout in judicial elections, although at slightly lower levels.[9] In any event, no comprehensive evidence of black and

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[9] Regression estimates from Dr. Lichtman and Dr. Haworth indicated that in the six judicial elections in which a black candidate participated, black voter turnout varied from fourteen percent to twenty-four percent, while white voter turnout varied from eighteen percent to twenty-seven percent. No other evidence of voter turnout in other elections was submitted to the Court.

white voter turnout for elections in the Fourth Judicial Circuit or Duval county was submitted to the Court. Second, the "rolloff" effect — the number of voters who sign-in at the polls but fail to cast a vote for an election — is greater among black voters than for white voters.

F. Candidate Slating Process

There is no evidence that a candidate slating process has been used to prevent black candidates from seeking circuit or county judgeships. The opportunity to seek judicial office is equally open to all qualified persons.

G. Use of Racial Appeals in Campaigns

Plaintiffs concede that there is no evidence that white candidates for judicial offices have used racially-biased appeals to exclude black candidates from circuit or county judgeships. More specifically, there is no evidence that racial appeals were used in any of the circuit or county judicial elections analyzed by the parties.

H. Extent of electoral success

At the time of trial there was one black judge among the twenty-eight circuit court judges and two black judges among the twelve county court judges.[10] Thus, 7.5% of the forty circuit and county judges are black. Judge Henry Adamson the circuit court attained office by virtue of appointment to a vacancy, and has not been opposed for his subsequent election. The same is true with county court Judge Alfred Washington. The second black county court judge, James Ruth, was appointed within the last year and has never stood for re-election.

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[10] Since the time of trial, Henry E. Davis, who is black, was appointed as a Circuit Judge. Davis is black. Judge Davis's appointment means that ten percent of the current circuit and county judiciary is black. The Davis appointment has played no part in the Court's consideration of this case.

The evidence of black electoral success is mixed. The black circuit and county judges who have faced reelection have been unopposed and, of course, successful in their reelection bids. In a similar judicial election, Joseph Hatchett's 1976 Supreme Court election, the incumbent Hatchett defeated a white candidate. Hatchett garnered a majority of the white vote in both the Fourth Judicial Circuit and Duval County. No black candidate has won a contested election for circuit or county judge at least since 1972. Of course, there have been no contested elections for circuit or county judge involving black candidates, other than the Shaw, Buggs, Washington, Prescod, and Micks elections.

A review of non-judicial elections shows similar mixed results. Black candidates have had modest success in county elections. Earl Johnson won a city council at-large seat in 1967, and was reelected in 1971, 1975, and 1979.[11] However, no black candidate has won a contested circuit wide or county wide election for any office since 1979. With the exception of Earl Johnson, many successful black candidates were incumbents by virtue of appointment. Harold Gibson and Gwendolyn Leapheart were incumbents by virtue of appointment when they won elections in 1975 and 1979, respectively, for the Civil Service Board in Duval County.[12]

I. Responsiveness

Witnesses called by both parties agreed that the current circuit and county judges are fair and impartial in the dispensation of justice.

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[11] In 1967, the Jacksonville City Council was created with fourteen council members elected in single member districts and five elected at-large county-wide.

[12] In addition, a black candidate defeated a white candidate in a Republican primary election for city council at-large in 1990, only to lose in the general election to another white candidate.

J. State Interests in Maintaining the Current System

a. Eligibility requirements

Under the Florida Constitution, a candidate for circuit judge must have been a member in good standing of the Florida Bar for at least five years prior to his or her obtaining judicial office. Fla. Const. art. V, § 8. Candidates for Duval County Judge must meet the same criteria.

These requirements, the legality of which have not been challenged in this case substantially limit the eligible pool of qualified judicial candidates. To illustrate this point, Dr. Haworth analyzed three categories of attorneys in the Florida Bar. First, Dr. Haworth calculated the number of black attorneys as a percent of the total attorneys of the Florida Bar located in the Fourth Judicial Circuit and Duval County. Second, Dr. Haworth analyzed the percentage of black attorneys eligible to be circuit or county judges. Finally, Dr. Haworth analyzed the percentage of attorneys with years of experience in the Florida Bar similar to those possessed by the incumbent judges when they were first selected(this group was termed the "likely pool" of candidates). Dr. Haworth's report, which the Court adopts as findings of fact on this point, demonstrates that black attorneys constitute only four percent of the total pool of attorneys in the circuit, three percent of the eligible attorneys in the circuit, and two and one-half percent of the likely pool of attorneys in the circuit. Virtually identical percentages exist for black attorneys in Duval County as well.

b. Maintaining circuit-wide scheme for single-member offices

Several state interests have been asserted in support of the current at-large system. Defendants assert that the state has a valid interest in allowing each citizen within the jurisdiction which the judge serves to have the right

to vote on each judge who might hear his or her case. Defendants assert that maintaining a link between a trial judge's jurisdiction and elective base serves to foster judicial independence while maintaining judicial accountability. Defendants also contend that a system of single-member districts or subdistricts would place added pressure on elected judges to respond to their specific electoral constituents when one of their constituents is involved in litigation against a nonresident of that subdistrict. It is also argued that subdistricts (and any system based on cumulative or limited voting) would generate more ideological, less impartial, judges.

K. Special circumstances

Several special circumstances are highly relevant to the issues in this case, and are discussed below. These are: (1) the role of incumbency; (2) the appointment process and its role in judicial selection and election; and, (3) special factors present in the judicial elections under challenge in which black candidates participated.

i. Incumbency

Only one of the twenty-eight current incumbent circuit judges has faced electoral opposition after his initial appointment or election.[18] None of the twelve current incumbent county judges has faced electoral opposition after his initial appointment or election. In judicial elections, incumbency and name recognition are the primary factors behind electoral success.

ii. The appointment process

Florida law requires the Governor to fill vacancies in the circuit and county courts by appointment, Fla. Const.

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[18] The one judge who did face opposition as an incumbent was white.

art. V, sec. 11 (b & d). The Governor must appoint one of at least three nominees submitted to him by the Fourth Judicial Circuit Nominating Commission (hereinafter "Commission"). *Id.* The Commission consists of nine members. Three members are appointed by the Board of Governors of the Florida Bar and must be attorneys in good standing of the Florida Bar. *Id.* sec. 20(5). Three members are appointed by the Governor and may or may not be attorneys. *Id.* These six appointed members must then select three additional members who may not be members of the Florida Bar. *Id.* Members of the Commission must reside or practice law within the territory of the Fourth Judicial Circuit. *Id.* Currently, three of the nine Commission members are minorities; in general, two of the nine Commission members for the past decade have been minorities.

Of the twenty-eight current circuit judges, seventeen were originally appointed to the circuit court.[14] Similarly, five of the twelve current county judges were originally appointed to the county court. The power of incumbency makes the appointment process especially relevant, since incumbent judges are rarely challenged. The appointment process is the primary vehicle by which judges on the circuit and county courts initially obtain office.

In addition, the appointment process is equally open to qualified minority and non-minority attorneys. Statistics provided by the Commission indicate that from 1987 to 1991, the Commission accepted applications for eleven circuit and county court vacancies. Of the total number of applicants, approximately eleven percent were black attorneys. An almost identical percentage of blacks were among the total number of nominees sent by the Commission to the Governor. Nine percent of the total

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[14] Of the eleven circuit judges who were not initially appointed, five circuit judges were initially elected unopposed.

appointments made by the Governor during this period were black (specifically, the county judge appointment in the summer of 1991).

iii. Special factors

Plaintiffs have relied heavily on the judicial elections involving black candidates (the Shaw, Buggs, Washington, Prescod, and Micks elections), even contending that elections not involving black candidates should not be analyzed. While the Court has already discussed the statistics on racial polarization for these elections, other important facts about those elections should also be noted.

In particular, in Harrell Buggs's unsuccessful 1978 bid for circuit judge, Buggs challenged an incumbent judge. Also, at the time of Alfred Washington's unsuccessful bid for county judge in 1978, Washington had resided in the community for only a short period of time. Washington ran against a person who had been in the community for a much longer period of time with an established law practice.

In Denise Prescod's unsuccessful 1984 bid for county judge, Prescod ran against an incumbent judge who was known as an extremely vigorous campaigner. In addition, in 1984 Prescod had been a member of the Florida Bar for only two years.[15] Another unique factor in the Prescod election was that her opponent, County Judge Westberry, was a non-lawyer judge, and received very poor ratings from the local bar prior to the 1984 election.

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[15] Prescod would not have been eligible to run for county judge in 1984 under current eligibility requirements.

IV. Conclusions of Law [16]

The Supreme Court has stated that a district court should perform " 'an intensely local appraisal of the design and impact' " of the electoral system at issue in a vote dilution case. *Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621, 102 S. Ct. 3272, 3278, 73 L. Ed. 2d 1012 (1982)). The Court must conduct a "searching practical evaluation of the 'past and present reality' " of the electoral system's operation. *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764 (quoting S. Rep. at 30). The Court must also evaluate the claim of vote dilution with a "functional," not a formalistic, view of the political process. *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764. With these general principles in mind, in addition to the legal standards reviewed in section II of this opinion, the Court will evaluate the Plaintiffs' claim of vote dilution.

A. Ability to draw a majority black subdistrict

As a prerequisite to establishing a claim of vote dilution, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to

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[16] The Court finds that Plaintiffs have standing to bring this suit. Plaintiff Jesse Nipper testified that he is a black registered voter in Duval County, and that he is aggrieved on account of his race by the present system for electing circuit and county judges. Plaintiff Nipper has thus satisfied the requirements that he allege that he suffers an actual injury which is fairly traceable to the current electoral system, and that a favorable decision would likely redress that injury. *See S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 757 (11th Cir. 1991). Furthermore, the Court finds that no prudential considerations are present which require this Court to refrain from deciding this case. *See id.* Having found that Plaintiff Nipper has standing, it is unnecessary to reach Defendants' additional arguments regarding the standing of Plaintiff D.W. Perkins Bar Association, because were relief to be granted to Plaintiff Nipper such relief would necessarily inure to all other Plaintiffs and black voters in the Fourth Judicial Circuit and Duval County.

constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766. Plaintiffs presented expert testimony which indicated that a subdistrict containing a 60.09% black voting age population can be created within the Fourth Judicial Circuit and Duval County. The Court finds that Plaintiffs have demonstrated that blacks area sufficiently large and geographically compact group to constitute a majority in a subdistrict.

B. Racially Polarized Voting

Plaintiffs must prove that racially polarized voting patterns exist in the Fourth Judicial Circuit and Duval County. In order to show racially polarized voting, Plaintiffs must show that blacks as a group are politically cohesive, and that the white majority votes sufficiently as a bloc to enable the majority usually to defeat the minority's preferred candidate. *See Gingles*, 478 U.S. at 51, 106 S. Ct. at 2766.

Before a determination can be made on the issue of racial polarization, a court must decide which elections to analyze. The most probative elections to analyze are those involving the offices under challenge — elections for circuit and county judge. *See, e.g., Carrollton Branch v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987). Both parties agree that, at a minimum, elections involving black candidates for circuit and county judge must be analyzed.

On their face, the voting estimates for the Shaw, Buggs, Washington, Prescod,and Micks judicial elections indicate that voting was racially polarized in those elections. Stated differently, the estimates show that blacks were politically cohesive in those judicial elections, and that the white majority voted sufficiently as a bloc to enable the majority to usually defeat the black minority's preferred candidate. The regression estimates and extreme case analyses show that in these elections,

black support for the black candidate ranged from 73% to 98%, white support for the black candidate ranged from 3% to 33%, black support for the white candidate ranged from 2% to 27%, and white support for the white candidate ranged from 67% to 97%. See Appendices A & B. These statistics would ordinarily make out a sufficient showing of racial polarization in these six judicial elections.

However, the judicial elections involving black candidates in this case are stale. The most recent of these elections, the Micks and Prescod bids for Duval County Judge, occurred in 1984, approximately six years prior to the filing of this lawsuit. All of the other four elections — the 1972 Shaw circuit judge primary and runoff, the 1978 Buggs circuit election, and the 1978 Washington county election — were over a decade old when this case was filed. These stale elections set this case apart from other vote dilution cases, where normally at least some elections for the offices under challenge occurring within one or two years of the lawsuit are relied upon. *See, e.g., Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 ; *Solomon*, 899 F.2d 1012. If no black candidates have participated in elections for the offices under challenge, then resent results from elections similar to the elections under challenge are often used. *See, e.g., Hall*, 955 F.2d at 1570-71; *Carrollton*, 829 F.2d at 1558.

Reliable election results from elections in the offices under challenge are particularly important in this case because of the uniqueness of judicial elections. Elections for circuit and county judge are nonpartisan, and are of a much lower profile than most partisan elections. As illustrated by Dr. Haworth's statistics on the number of voters who show up to the polls but do not vote for a judicial candidate, elections for circuit and county judge are of substantially lesser interest to the local electorate than are partisan, nonjudicial elections. Thus, it is crucial to have reliable judicial election results in a vote

dilution challenge to a judicial election system, simply because most exogenous elections are substantially dissimilar to judicial elections. *Cf. League of United Latin American Citizens v. Clements*, 914 F.2d 620, 631 (5th Cir. 1990), *rev'd, Houston Lawyers*, 115 L. Ed. 2d 379, 111 S. Ct. 2376 (1991) (noting that "judicial officers and judicial selection processes are *sui generis*. . . .").

The Court is not aware of any statute of limitations that applies to vote dilution cases. However, the stale nature of the judicial elections involving black candidates has some adverse effect on the probative value of those elections.

Defendants contend that all elections for circuit and county judge from 1972 to 1990 must be analyzed before this Court can determine whether racially polarized voting exists, regardless of whether a black candidate participated in the election or not. Considering this broader set of elections, the black candidate of choice won 68% of the contested circuit court elections, and the black candidate of choice won 58% of the contested county court elections. Clearly, when all elections for circuit and county judge from 1972 to 1990 are considered, Plaintiffs have failed to prove that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. *See Gingles*, 478 U.S. at 49, 106 S. Ct. at 2765-66.

Due to the stale nature of the judicial elections involving black candidates, a compelling argument can be made that all elections for circuit and county judge from 1972 to 1990 should be considered in determining racial polarization, regardless of the race of the candidates. Furthermore, a plurality of the Supreme Court has stated that "the race of the candidate per se is irrelevant to racial bloc voting analysis." *Gingles*, 478 U.S. at 67, 106 S. Ct. at 2775 (emphasis in original); *see also Carrollton*, 829 F.2d at 1558 (stating that "it is the race of the voter, not of the candidate, which is of concern in racial polari-

zation claims"). The *Gingles* plurality went on to state that "under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important. "*Gingles, supra* (emphasis in original). If this statement were the law of the land, this Court would be *required* to give equal weight to all elections for circuit and county judge from 1972 to 1990, regardless of the race of the candidates.

For the following reasons, the Court will give some weight to the circuit and county judicial elections between 1972 and 1990 that did not involve black candidates, although the judicial elections involving black candidates are of greater importance. First, only a plurality of the Supreme Court agreed that the race of the candidate is irrelevant. *See Gingles*, 478 U.S. at 82-83, 106 S. Ct. at 2783 (White, J., concurring), and 478 U.S. at 101, 106 S. Ct. at 2792 (O'Connor, J., concurring in the judgment). Second, the *Gingles* Court itself only analyzed elections involving black candidates, although this may have merely been a result of the record developed by the district court.

Intermediate appellate courts are also divided on this issue. The Fifth Circuit has held that district courts should focus only on elections involving minority candidates unless elections involving only white candidates offer minority voters the choice of a "viable minority candidate." *See Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988).[17] The Eleventh Circuit, in *Carrollton*, noted that a plurality of the Supreme Court

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[17] Determining who is or is not a "viable minority candidate" would seem particularly problematic in judicial elections, since judges do not represent any one particular group. The Firth Circuit would find it proper to focus on elections not involving minority candidates if it could be shown that minority turnout was sufficiently similar regard-

has stated that it is the race of the voter, not of the candidate, which is of concern in vote dilution claims. *See Carrollton*, 829 F.2d at 1558. However, the *Carrollton* court had no occasion to decide whether elections not involving minority candidates should be considered.

Therefore, without any specific guidance from the appellate courts, this Court will fashion a rule based on the available precedent. This Court will refuse to adopt the Plaintiffs' argument that a black candidate will automatically be preferred by black voters over a white candidate. While this Court does not sit as a pollster, it is fair to say that in a judicial election in Duval County between Clarence Thomas and William Brennan, there would probably be a substantial difference of opinion among black voters as to their candidate of choice. At the same time, the appellate courts do appear to give elections involving black candidates more importance than elections that do not involve black candidates. For these reasons, the Court will give the circuit and county judicial elections involving black candidates primary importance, and give the circuit and county judicial elections involving only white candidates secondary importance.

Evaluating the evidence under this standard, Plaintiffs have failed to prove that racially polarized voting exists in the Fourth Judicial Circuit and Duval County. When a black candidate runs for judicial office, the black candidate is always supported by the overwhelming majority of black voters; however, as the following discussion will illustrate, the black candidate is not usually defeated by white bloc voting in the absence of special circumstances.

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less of the race of the candidate. *See Campos*, 840 F.2d at 1245. The Court finds some merit in this basic principle. Unfortunately, insufficient evidence of turnout comparisons for judicial elections involving black candidates and judicial elections involving only white candidates was provided to the Court.

Several reasons support this Court's conclusion. First, as noted earlier, the judicial elections involving black candidates are stale, thus providing a less reliable indicator of current polarization. Second, when judicial elections not involving black candidates are included in the analysis, the black candidate of choice for circuit or county judge wins the majority of the time.

Most importantly, special circumstances in several of the judicial elections involving black candidates are damaging to the Plaintiffs' attempt to prove racial polarization. In *Gingles*, the Supreme Court stated that minority electoral *success* does not foreclose a vote dilution claim if that success can be explained by special circumstances, such as the minority candidate running unopposed, or the fact that the minority candidate ran as an incumbent. *See Gingles*, 478 U.S. at 57, 106 S. Ct. at 2770. The converse of this proposition must also be true. That is, any balanced consideration of a vote dilution claim should also take into account any special circumstances that may explain minority electoral *failure* in a polarized contest. In particular, the same special circumstances identified by the *Gingles* Court to explain minority success — incumbency and the absence of an opponent — should be considered in analyzing elections in which minority candidates have been defeated.

In this case, special circumstances exist in at least two of the six elections for circuit and county judge in which black candidates participated. In the 1978 election for circuit judge involving black candidate Harrell Buggs, Buggs challenged an incumbent judge. Similarly, in the 1984 election for county judge involving Denise Prescod, Prescod also challenged an incumbent judge.[18] Given the

[18] Plaintiffs correctly note that the incumbent judge challenged by Prescod received very poor ratings from the local bar. However, this factor is offset by the fact that Prescod ran for judicial office despite only having been admitted to the Florida Bar two years earlier. In the Court's view, neither candidate's qualifications in 1984 were particularly helpful to their respective campaigns, and in all probability incumbency ultimately proved to be the deciding factor.

undeniable power of incumbency in judicial elections, the probative value of these two elections is significantly diminished on the issue of racial polarization.[19] Thus, of the six judicial elections for circuit and county judge involving black candidates, only the 1972 Shaw runoff, the 1978 Washington election, and the 1984 Micks election can be considered strong evidence of racial polarization in the absence of special circumstances. The Buggs and Prescod elections are better viewed as evidence of the power of incumbency rather than as strong evidence of racial polarization. And, of course, Shaw actually "won" the 1972 circuit judge primary by finishing first and advancing to the runoff.[20] Therefore, in only three of the six judicial elections for circuit and county judge did white bloc voting operate to defeat the black candidate in the absence of special circumstances. This fifty percent showing of black electoral failure falls short of the *Gingles* requirements, since the Supreme Court has stated that vote dilution only occurs where white bloc voting *usually* is able to defeat the black candidate, in the absence of special circumstances.[21]

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[19] It is also worth noting that, in a 1978 election for county judge, Alfred Washington ran against a candidate who had been in the local community for a much longer period of time than Washington. Washington's opponent also had an established and successful law practice.

[20] Shaw's victory in the primary must be counted as an election in which a black candidate won, despite Shaw's ultimate defeat in the runoff. The majority vote requirement is taken into account later in the analysis, under the section entitled "Electoral Structure." To not count Shaw's primary victory as evidence of minority electoral success, but to later count the majority vote requirement against the Defendants, would illogically give weight to the same factor twice.

[21] Even if Shaw's "win" in the primary is not considered, the black candidate has been defeated three out of five times. The Court finds that this sixty percent showing of black electoral failure also is insufficient to show that the black candidate *usually* is defeated due to white bloc voting.

The exogenous elections, to the extent that they are relevant, tend to support these conclusions. Unquestionably, the election which is most analogous and relevant to the elections under challenge is Joseph Hatchett's successful 1976 election to the Florida Supreme Court. Hatchett won almost unanimous support from black voters and won a majority of white voters in the circuit and county. However, Hatchett, a black, ran as an incumbent in the 1976 election, and thus the probative value of his election is diminished by the special circumstance of incumbency.

The Court further finds that statistical evidence from other exogenous elections is inconclusive on the issue of racial polarization. Black candidates achieved some electoral success in local at-large elections in the 1970s, and recently a black candidate was successful in a Republican primary election. On the other hand, several recent presidential and other high profile elections have been characterized by racially polarized voting. In any event, these elections are entitled to little weight due to the significant differences between judicial and non-judicial elections in Florida, and because of the significant number of judicial elections available for analysis.

In evaluating the issue of racial polarization, the Court has also considered nonstatistical evidence (such as lay testimony), and has reviewed the other Senate Report factors. *See Hall,* 955 F.2d at 1573. The lay testimony confirmed much of the statistical analysis; that is, the lay testimony showed that black judicial candidates were defeated by white bloc voting in three instances, but that important special circumstances were present in the Buggs and Prescod elections. As for the Senate Report factors (which are fully discussed *infra*), these factors overwhelmingly support and confirm the Court's findings on the issue of racial polarization.

In summary, after considering all the relevant evidence, the Court finds that Plaintiffs have failed to

make a sufficient showing of racially polarized voting in the Fourth Judicial Circuit and Duval County. This finding alone requires a ruling in favor of the Defendants. However, in the interests of providing a comprehensive opinion, the Court will consider Defendants' proof of other objective factors in rebuttal that indicate, under the totality of the circumstances, that the voting community is not driven by racial bias. See Solomon, 899 F.2d at 1035 (Tjoflat, J., concurring specially).

C. Electoral Structure

The Court finds that the electoral structure of the Fourth Judicial Circuit and Duval County has little, if any, effect on black voters' opportunity to participate in the political process and to elect representatives of their choice. As the above discussion has illustrated, judicial elections are at-large elections. The effect of the at-large nature of the elections has been considered above in the Court's analysis of racial polarization in the Fourth Judicial Circuit and Duval County.

The Court further finds that the Fourth Judicial Circuit and Duval County are not unreasonably large election districts. The print, radio, and television media provide all candidates with an avenue to reach the circuit and county voters. The state also has valid interests — promoting administrative flexibility in scheduling, and deterring forum shopping — in having a multi-county circuit court and a single county court, as opposed to a subdistrict system. Furthermore, Plaintiffs have failed to show that the size of the election districts impedes black voters in any material way. The black voting age population is registered in a greater proportion than is the white voting age population, and no showing has been made that the size of these election districts has any adverse effect on black voter turnout. To hold otherwise would be to rely on pure speculation. Similarly, there is no convincing evidence that the size of these election

districts impedes black judicial candidates in any material way.

Florida also employs a majority vote requirement, a numbered place system, and staggered terms. The majority vote requirement can result in a situation where the black candidate advances in the primary but loses in a runoff election, such as the 1972 circuit court election involving Leander Shaw.[22] However, the Court finds that Florida has a valid interest in requiring that a successful judicial candidate gain the support of a majority of the voters. This requirement also works to help black and white incumbent judges remain in office, because the name recognition provided by incumbency provides the incumbent a substantial advantage in gaining majority support.

Florida also maintains a numbered place system, whereby a candidate for circuit or county judge must run for a designated seat. This requirement undeniably protects incumbents, since a non-incumbent candidate is virtually required to challenge an incumbent judge, unless the seat is open. The Court finds that the use of a numbered place system furthers the State's interest in reducing the number of contested judicial elections, by not pitting incumbent judges against each other in each election. Furthermore, the numbered place requirement helps black and white voters elect judges of their choice by protecting both black and white incumbent judges from facing a contested election at the expiration of each term. Indeed, only one of the forty current circuit and county judges has faced electoral opposition after his or her initial appointment or election.

Finally, the Court finds that the use of staggered terms has no effect on black voters' ability to participate in the political process and elect candidates of their choice.

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[22] The evidence also showed that, from 1972 to 1984, five white candidates led the primary only to lose in the runoff election.

This requirement simply serves the State's legitimate interest in maintaining a stable judiciary by ensuring that there will not be large-scale judicial turnover in any single electoral year.

D. History of Discrimination

It is undisputed that Florida has a history of discrimination against its black citizens. In the past, Florida has employed devices which have had the purpose or effect of depriving black voters of electoral power. These devices include the expungement of black voters from voting lists, a poll tax, a multiple ballot statute, the direct primary, and a requirement that office holders post bonds.

However, none of these discriminatory devices have been in effect for decades. Florida's history of official discrimination in the areas of public transportation and education is similarly remote. This is important, since a state's history of discrimination is relevant only to the extent that it affects the rights of the members of the minority group to register, to vote, or other wise to participate in the democratic process. *See Gingles*, 478 U.S. at 36-37 and 69, 106 S. Ct. at 2759 and 2776; *see Carrollton*, 829 F.2d at 1561 (requiring some causal connection between past discrimination and low levels of black political participation).

Statistics on political participation indicate that Florida's history of discrimination has no cognizable current impact on black voters' current ability to participate in the political process. The black voting age population in the Fourth Judicial Circuit and Duval County is actually registered at a higher rate than the white voting age population. No evidence introduced at trial indicated that Florida's history of discrimination has any negative impact on black voter turnout in recent elections.[23]

[23] No comprehensive evidence on black and white voter turnout was presented to the Court.

In fact, testimony from black voters indicated that they have had no problems registering, voting, or participating in judicial elections. While there does appear to be a higher "rolloff" effect in judicial elections for blacks than whites, there is no evidence that this "rolloff" effect is attributable in anyway to Florida's history of discrimination. In sum, the Court finds that Florida's history of discrimination has no current impact on black voters' ability to participate in the political process for electing judges in the Fourth Judicial Circuit and Duval County.

E. Socio-economic Effects of Discrimination

It is undisputed that blacks in Florida still suffer from the socio-economic effects of past discrimination. Blacks in the Fourth Judicial Circuit and Duval County have lower median incomes than whites, are more likely to have incomes below the poverty line, have lower rates of education, lower rates of car ownership, and are more likely to be unemployed. Blacks in this area are simply not as well off economically as whites.

However, the continuing socio-economic effects of past discrimination are only relevant in this case if they continue to "hinder [the minority group's] ability to participate effectively in the political process." *Gingles*, 478 U.S.at 37 and 69, 106 S. Ct. at 2759 and 2776 (stating that the relevant inquiry is the "impact of low socioeconomic status on a minority group's level of political participation."); *see Hall*, 955 F.2d at 1572; *Carrollton*, 829 F.2d at 1561-62. Based on the evidence in this case, the Court finds that the ability of black voters to participate effectively in the political process for electing circuit and county judges is not materially affected by the continuing socio-economic effects of past discrimina-

tion. As noted in the preceding section, black voters are actually registered at a higher rate than white voters, and there is no evidence to indicate that the lingering effects of discrimination have any material effect on black voter turnout or rolloff.

The Court also finds that the costs of running for judicial office are not a significant barrier to prospective black candidates. Because the costs of maintaining a judicial campaign (at least in the numerous unopposed elections) are small in comparison to most non-judicial elections, the economic disparities between blacks and whites are largely immaterial to the election of circuit and county judges. In addition, the filing fees for judicial candidates are not "enormous," contrary to Plaintiffs' characterizations, and can be avoided altogether by a petition method, *but cf. McMillan v. Escambia County*, 748 F.2d 1037, 1044 n.18 (11th Cir. 1981), or can be paid with funds obtained from local lawyers or other sources.

F. Candidate Slating Process

There is no candidate slating process for judicial office in the Fourth Judicial Circuit or Duval County. Accordingly, Defendants have demonstrated that blacks are not prevented from seeking judicial office in the Fourth Judicial Circuit and Duval County by means of a candidate slating process.

G. Use of Racial Appeals in Campaigns

White candidates for judicial office in the Fourth Judicial Circuit and Duval County have not used racial appeals to obtain judicial office for themselves or to exclude black candidates from judicial office. Thus, Defendants have demonstrated that racial appeals have not been used to exclude blacks from circuit or county judgeships.

H. Extent of electoral success

The extent of minority electoral success is one of the two most important factors in this case, along with evidence of racial polarization. *See Gingles*, 478 U.S. at 48-49 n.15, 106 S. Ct. at 2765-66 n.15. At the time of trial, three of the forty circuit and county judges were black. One of these three was appointed to a vacancy after this case was filed. Thus, at the time of trial, seven and one-half percent of the circuit and county judges were black, and, at the time this case was filed, five percent of the circuit and county judges were black.

These percentages are low in comparison with the black percentage of the total electorate. However, Florida's eligibility requirements for circuit and county judge significantly limit the number of qualified persons. Only lawyers who are members of the Florida Bar with five years experience are eligible for circuit or county judge. Statistics indicate that black attorneys who are members of the Florida Bar with five years experience account for only three percent of the total eligible attorneys in the circuit, and only two and one-half percent of the total attorneys with the likely range of experience for circuit and county judges at the time of their selection.[24] Thus, since the percentage of black circuit and county judges is substantially greater than the percentage of black lawyers who are eligible or likely to be a circuit or county judge,[25] it is an undeniable fact that black attor-

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[24] Statistics for Duval County are virtually the same.

[25] Florida's history of official discrimination in the operation of its publicly sponsored law schools is too remote to be the proximate cause of the low black representation in the local bar. Dr. Haworth's analysis of the pool of eligible lawyers who would likely be candidates for circuit and county judge convincingly indicates that all attorneys in the likely pool of candidates would have entered law school at least several years after official discrimination had ended. In addition,

neys have actually had greater success in recent years in obtaining circuit or county judgeships than have white attorneys.[26] Plaintiffs' reliance on comparisons of the racial composition of the population and the racial composition of the local judiciary is illogical and contrary to recent Supreme Court precedent. *Cf. Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 109 S. Ct. 2115, 2121, 104 L. Ed. 2d 733 (1989) (stating, in the employment discrimination context, that the " 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the *qualified* . . . population in the relevant labor market.' ") (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308, 97 S. Ct. 2736, 2741, 53 L. Ed. 2d 768 (1977)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 725, 102 L. Ed. 2d 854 (1989) (stating that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrat-

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the number of blacks in Florida's law schools has remained relatively static in recent years, see Ethnic Bias Study Commission report at 96-97, indicating that low black representation in the local bar is the result of causes not directly attributable to the State of Florida.

[26] Section two of the Voting Rights Act specifically states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." This provision does not speak directly to the situation where an office has special eligibility requirements, such as a judicial office in which bar membership is a requirement of obtaining office. If the principle embodied in section two's disclaimer about proportional representation does apply to this case, then Plaintiffs' claim of vote dilution fails on this basis alone: the percentage of black representation in the circuit and county judiciary is higher than the percentage of black membership in the local bar. At a minimum, the significant black representation in the local judiciary is an important factor to be considered under the totality of the circumstances. *See Gingles*, 478 U.S. at 77, 106 S. Ct. at 2780 (stating that persistent proportional representation is generally inconsistent with a successful section two claim).

ing discriminatory exclusion must be the number of minorities qualified to undertake the particular task.").

It is true that the current black circuit and county judges all obtained office initially by appointment. However, this is also true for many other judges on these courts: seventeen of the twenty-eight current circuit judges, and five of the twelve county judges, were initially appointed to the court.[27] Furthermore, *Gingles* requires this Court to take a "functional" view of the political process, with a "searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764. A functional and realistic view of the political process for selecting circuit and county judges must include the appointment process in addition to the at-large nature of the system. The appointment process and the access it has provided to black judicial applicants cannot, and should not, be ignored.

The appointment process, which the evidence shows is equally open to black and white applicants, is particularly important because of the powerful nature of judicial incumbency. The evidence shows that incumbent circuit and county judges are rarely challenged and almost never defeated. Thus, the appointment of a judge, black or white, has great significance. The appointed judge will be almost assured of a lengthy and unchallenged

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[27] Because appointment is the primary method by which local judges initially obtain office, the case of *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984), is clearly distinguishable. In *Marengo*, the Eleventh Circuit said that the appointment of one black to the school board did not establish black electoral success in any real sense. *Id.* at 1572. The facts in the case at bar are far different from *Marengo*. Appointment to the circuit or county bench is not something that occurs in isolated instances. Rather, appointment is the primary method of obtaining office for white and black judges of these courts.

tenure on the bench. This proposition is true for black and white judges alike. While the current black judges who have stood for reelection have been reelected unopposed, Justice Hatchett's 1976 reelection to the Florida Supreme Court strongly indicates that the incumbent black circuit and county judges have the opportunity to be reelected even if they are challenged. Accordingly, the Court finds that blacks have experienced electoral success, and that eligible blacks are currently represented in the circuit and county judiciary at a rate that is higher than the rate of representation for eligible whites.

I. Responsiveness

The evidence indicates that the current circuit and county judges are fair and impartial in the performance of their judicial duties. Accordingly, to the extent that this factor is relevant, the Court finds that there is no lack of responsiveness by these judges to the needs of the local black community.

There was testimony that a perception exists among the black community that the judicial system is an exclusive white-male club, and that it is difficult for blacks to obtain just treatment in the judicial system. This perception was alluded to by a sitting black circuit judge and a prominent local black attorney. Witnesses also agreed that this perception is erroneous in that the circuit and county judges are fair, be they white or black.

The Voting Rights Act is not directed to "perceptions" about "the system. "Instead, the Act is directed to remedy inequalities in voting where the minority group has less opportunity to participate in the political process and to elect representatives of their choice. Thus, the perception about the judicial system that exists in the black community is irrelevant to this case. The evidence suggests that it is also inaccurate. Furthermore, as the discussion in the preceding section indicates, eligible

blacks are actually represented in the judiciary in a greater proportion than eligible blacks are represented in the local bar, a fact which directly contradicts the minority group's erroneous perception about the judiciary.

J. State Interests in Maintaining the Current System

The Court has already discussed Florida's eligibility requirements for circuit and county judge. Those requirements need not be repeated here. In any event, Florida's eligibility requirements are not under challenge in this case, and are eminently reasonable.

Florida has also asserted a state interest in support of the at-large nature of the current system; namely, that a state has an interest in maintaining a link between a trial judge's jurisdiction and the judge's elective base. The Defendants argue, and the Court agrees, that the link between a judge's jurisdiction and elective base serves to foster judicial independence, or at least the appearance of judicial independence. In a system of single-member subdistricts, there would be some pressure on elected judges to respond to specific electoral constituents when one of their constituents is involved in litigation against a nonresident of that subdistrict. The at-large system eliminates this pressure by linking the judge's jurisdiction and elective base. *Cf. Houston Lawyers,* 111 S. Ct. at 2381 (stating that "the State's interest in maintaining an electoral system — in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters — is a legitimate factor to be considered by courts among the 'totality of circumstances' ").

Plaintiffs' contend that the state's interest in maintaining the current system is properly considered at the remedy stage of the litigation. This argument misses the

point. The Supreme Court itself has stated that a state's interest in maintaining an electoral system is a legitimate factor to be considered under the totality of the circumstances in the liability phase of a section two case.[28] *See Houston Lawyers,* 111 S. Ct. at 2381.[29] In sum, the Court finds that Florida has a legitimate interest in maintaining the current at-large system of electing judges in the Fourth Judicial Circuit and Duval County.[30]

V. Summary of Vote Dilution Issue

The Court finds that Plaintiffs have failed to prove that the at-large system for electing judges in the Fourth Judicial Circuit and Duval County violates section two of the Voting Rights Act, for the following reasons. First, Plaintiffs have failed to prove that black candidates for circuit and county court are usually defeated by white bloc voting in the absence of special circumstances. This proposition is true if only judicial elections involving black candidates are considered, and is also true if judicial elections not involving black candidates are included

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[28] Plaintiffs contend that a remedial approach other than subdistricting, such as cumulative voting, would satisfy the state's interest in linking jurisdiction with elective base while promoting greater opportunities for black voters. The Court has no occasion to consider this contention, since proposed remedies are relevant only if a violation is proved. Furthermore, nothing in *Houston Lawyers* or the history of section two suggest that the electoral system chosen by a state must be narrowly tailored to the state's interests in maintaining that system.

[29] Plaintiffs also contend that "asserted state interests in at-large election systems have repeatedly been rejected as a defense in Section 2 cases. "This assertion ignores the Supreme Court's observations in *Houston Lawyers.*

[30] As noted in Judge Higginbotham's concurring opinion in *LULAC v. Clements,* 914 F.2d at 645-51, fundamental concepts of federalism counsel against disregarding a state's basic choice of how to structure its trial court system.

in the analysis.[81] Second, even if Plaintiffs had made a sufficient showing of racial polarization, Defendants have offered overwhelming proof of objective factors in rebuttal that demonstrate, under the totality of the circumstances, that the social conditions in the Fourth Judicial Circuit and Duval County are such that their interaction with the electoral scheme do not, and will not, result in voting discrimination in the judicial elections under challenge. Specifically, Defendants have proved that there are legitimate state interests in maintaining the current system, that eligible blacks have achieved more than proportional representation on the circuit and county courts, that no racial appeals or candidate slating processes have been used to exclude black voters or candidates from the electoral process, that the current circuit and county judges are responsive to the needs of all citizens, and that Florida's history of discrimination and the lingering effects thereof do not have a material current impact on black voters' ability to participate in the political process. Accordingly, the Court will rule for the Defendants and against the Plaintiffs on the claim of vote dilution.

VI. Constitutional Claim

Plaintiffs also claim that the current system for electing circuit and county judges violates the Fourteenth and Fifteenth Amendments to the United States Constitution. To succeed on this constitutional claim, Plaintiffs must prove that the system was conceived or operated as a purposeful device to further racial discrimination. *See Mobile v. Bolden*, 446 U.S. 55, 62-70, 100 S. Ct. 1490, 1497-1501, 64 L. Ed. 2d 47 (1980).

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[81] Taken as a whole, the exogenous elections, the other Senate Report factors, and the non-statistical evidence tend to confirm these conclusions.

The Court initially rejects Plaintiffs' contention that the evidence submitted in support of the section two claim establishes an equal protection violation. None of this circumstantial evidence even remotely supports the inference that the current system of electing circuit and county judges was conceived or operated with the intent to discriminate on the basis of race. The main case relied upon by Plaintiffs in this regard, *Rogers v. Lodge,* 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982), is distinguishable in many respects from the case at bar. In *Rogers,* no black had ever served in the office under challenge, black voter registration lagged behind white voter registration, blacks were excluded from participating in party politics, and elected officials were completely unresponsive to the needs of the black community. *See id.* 458 U.S. at 623-26, 100 S. Ct. at 3279-80. As the Court's findings on the vote dilution issue clearly demonstrate, none of these factors is present in this case.

Furthermore, the Court finds that Plaintiffs have offered no convincing direct evidence of discriminatory intent. On this issue, the Court credits the testimony of Dr. William Rogers. Dr. Rogers testified that Florida has alternated between electing and appointing circuit judges for over a century [82] and that these changes largely reflect competing notions of Jacksonian democracy and the desire to depoliticize the judiciary.

Specifically, in 1913 Florida required circuit judges to be nominated in the Democratic primary, and then appointed by the governor with the consent of the senate. In 1942, Florida changed its system by requiring circuit judges to run in partisan, at-large elections,

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[82] Florida has alternated between the election and appointment of judges many times: election was chosen in the 1840's, appointment as of 1861, election in 1865, appointment as of 1868, a system of primary election with appointment by the governor as of 1913, and back to election as of 1948.

with the new system scheduled to take effect in the 1948 elections. There were several reasons for the 1942 shift, none of which was based on a purpose to discriminate against blacks. First, at-large elections eliminated the real possibility that a powerful state senator could block a circuit judge's appointment by the governor. Second, at-large elections were a natural result of a renewed wave of Jacksonian democracy in Florida politics which occurred during World War II. Finally, Democrats had little to fear from Republican or black opposition in a general election, since both the Republican party and black voters had little political power at the time. In addition, sad as it may be, few Floridians at the time even considered the possibility of having blacks serve as circuit judges. This is evidenced by the fact that racial discrimination against blacks was never mentioned as a part of the legislative process which triggered the 1942 change to partisan, at-large elections.

In 1971, Florida passed a law which called for the nonpartisan, at-large election of circuit and county judges by majority vote. One year later, Florida made major changes to its constitution with respect to the state's judiciary. In the 1972 revision, Florida retained the at-large, nonpartisan election system for circuit and county judges, but also required circuit judges to have been a members of the Florida Bar for five years, to be voters and reside in their districts, and to retire at age seventy. The appointment process was revamped with the creation of judicial nominating commissions. The tenure of circuit judges was set at six years, while county judges had a tenure of four years. Both black and white voters supported the 1972 revision. The revision was supported by a prominent civil rights advocate, Talbot "Sandy" D'Alemberte, and by the two black legislators in the 1972 legislature.

In support of their contention that the 1942 shift to at-large elections was motivated by racial discrimination,

Plaintiffs rely on two main cases, *McMillan v. Escambia County*, 638 F.2d 1239 (5th Cir. 1981), and *NAACP v. Gadsden County School Bd.*, 691 F.2d 978 (11th Cir. 1982). These cases found that the decision to change the method of electing school board members from a single-member district system to an at-large system was motivated by racial discrimination. However, the shift from single-member districts to at-large elections in *Escambia* and *Gadsden* was made immediately *after* the director "all-white" primary had been declared unconstitutional. *See Escambia*, 638 F.2d at 1245-46 (stating that the "abrupt, unexplained departure from that forty-year policy [of single-member districts] upon the heels of the white primary's demise justifies the district court's conclusion that the change was racially motivated."). By contrast, Florida made the decision to elect circuit judges in at-large elections in 1942, *before* the direct primary was declared unconstitutional. The decision to submit the election of judges to the entire electorate gave blacks (and Republicans, for that matter) at least some voice in those elections at a time when the direct primary still operated in non-judicial elections. This further indicates that the 1942 decision to elect circuit judges in partisan, at-large elections was not racially motivated.

In addition, it is misleading to say that there was a "shift" to at-large elections for circuit judges in 1942, because circuit judges were elected at-large in the direct primary established in 1913. It is true that in 1915, Florida required candidates for multi-member offices to run in single-member district primaries. However, Dr. Rogers's research indicates that circuit judges were unaffected by the 1915 legislation, and continued to be elected at-large in the primary. Thus, the decision to elect judges at-large in 1942 was simply a decision to do away with the primary system with respect to the election of circuit judges, and merely continued the at-large method in a general election. This fact alone distinguishes the *Escambia* and *Gadsden* cases, which struck down the

abrupt change from single-member districts to an at-large system in the years following the end of the direct primary.

Similarly, there is no evidence of racial motivation in Florida's decision in 1913 to nominate circuit judges in the primary with appointment by the governor. Since blacks had already been eliminated as voters in 1913 by other means, further discrimination would have been an act of redundancy. *Cf. McGill v. Gadsden City. Comm'n,* 535 F.2d 277, 280-81 (5th Cir. 1976) (holding that, because blacks were essentially disenfranchised already by less subtle electoral mechanisms, the shift to at-large election of county commissioners in 1900 was not racially motivated).

With respect to county judges, Plaintiffs offered little, if any, direct evidence or argument that the current system of electing county judges was conceived or maintained for a discriminatory purpose. Dr. Rogers's report thoroughly surveyed the history of the county courts and found no evidence of an intent to discriminate against blacks in the decision to elect county judges in at-large, nonpartisan contests. The Court adopts this report as findings of fact on this issue.

In sum, the Court finds no evidence that the current system for electing circuit and county judges was established or has been maintained for a discriminatory purpose. The Court finds that Florida's 1942 decision to elect circuit judges in at-large elections was not racially motivated, but rather was driven by a Jacksonian desire to make the judiciary accountable to the people. With respect to the 1971 and 1972 revisions of the system, there is simply no shred of evidence that those revisions were adopted or have been maintained for a discriminatory purpose.

Accordingly, it is now

ORDERED AND ADJUDGED:

In accordance with this opinion, the Clerk is directed to enter judgment for the Defendants and against the Plaintiffs.

DONE AND ORDERED in Chambers, in Jacksonville, Florida, this 2nd day of June, 1992.

John Moore, II, UNITED STATES DISTRICT JUDGE

APPENDIX A.1.

Summary of Results of Ecological Regressions for Judicial Elections

	% of Black Voters Voting for Black Cand.(s)	% of Black Voters Voting for White Cand.(s)	% of White Voters Voting for Black Cand.(s)	% of White Voters Voting For White Cand.(s)	R<2>	Stat. Signif.
Fourth Circuit						
1972 Primary						
Leander Shaw						
Circuit	92	8	24	76	.94	.00001
Duval Co. Only	93	7	23	77	.95	.00001
1972 Runoff						
Leander Shaw						
Circuit	97	3	33	67	.95	.00001
Duval Co. Only	98	2	32	68	.90	.00001
1978 Primary						
Harrell Buggs						
Circuit	82	18	3	97	.97	.00001
Duval Co. Only	81	19	4	96	.98	.00001
Duval Co. Judge						
1978 Primary A. Washington	88	12	13	87	.97	.00001
1984 Primary Group 4 Denise Prescod	73	27	31	69	.82	.00001
1984 Primary Group 8 Deitra Micks	76	24	4	96	.90	.00001

APPENDIX B.1.

Summary of Extreme Case Analysis in Judicial Elections

	Predominantly Black Precincts % of Voters Voting for Black Candidate	Predominantly White Precincts % of Voters Voting for Black Candidate
Fourth Circuit		
1972 Primary		
Leander Shaw		
Circuit	90	25
Duval Co. Only	90	24
1972 Runoff		
Leander Shaw		
Circuit	96	34
Duval Co. Only	96	34
1978 Primary		
Harrell Buggs		
Circuit	76	6
Duval Co. Only	76	6
Duval Co. Judge		
1978 Primary		
A. Washington	85	14
1984 Primary		
Group 4		
Denise Prescod	72	33
1984 Primary		
Group 8		
Deitra Micks	74	8

APPENDIX D

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
F I L E D
MAR 3 1 1995
OFFICE OF THE CLERK

Case No. 94-1463

IN THE

Supreme Court of the United States

October Term, 1994

JESSE L. NIPPER, et al.,

Petitioners,

vs.

JIM SMITH,
Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Section 2 of the Voting Rights Act, Florida's interests in maintaining a partial "Missouri Plan" involving at-large elections for trial judges and merit selection for filling vacancies, are sufficiently strong as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have shown below?

2. Whether the Eleventh Circuit's particularized holding as to the weight accorded Florida's partial "Missouri Plan" for judicial selection conflicts with precedent of this Court, and other federal circuit and district courts?

3. Whether the Eleventh Circuit's decision erroneously extends the "benchmark" theory of *Holder v. Hall,* 114 S.Ct. 2581 (1994), so as to preclude a Section 2 remedy in the case *sub judice.*

4. Whether, as a result of the Eleventh Circuit's decision, there remain unresolved issues of national importance regarding the appropriate standards for evaluating a Section 2 vote dilution challenge to Florida's partial "Missouri Plan" and the role of Florida's interests in that evaluation.

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By its fact-intensive, intensely localized analysis, the Eleventh Circuit concluded, consistent with *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), that under Section 2 of the Voting Rights Act, Florida's interests in maintaining a partial "Missouri Plan" involving at-large elections for trial judges and merit selection nominating commission system for filling vacancies, is sufficiently strong as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have shown below. Accordingly, there is neither decisional conflict, an erroneous extension of this Court's precedent, nor are there any unresolved issues of national importance requiring this Court to further explicate the "appropriate standards" already contained in this Court's precedent 8

I.

UNDER SECTION 2 OF THE VOTING RIGHTS ACT, FLORIDA'S INTERESTS IN MAINTAINING A PARTIAL "MISSOURI PLAN" INVOLVING AT-LARGE ELECTIONS FOR TRIAL JUDGES AND MERIT SELECTION FOR FILLING

VACANCIES, ARE SUFFICIENTLY STRONG AS TO OUTWEIGH, AS A MATTER OF LAW, WHATEVER EVIDENCE OF VOTE POLARIZATION PETITIONERS MAY HAVE SHOWN BELOW 8

II.

THE ELEVENTH CIRCUIT'S PARTICULARIZED HOLDING AS TO THE WEIGHT ACCORDED FLORIDA'S PARTIAL "MISSOURI PLAN" FOR JUDICIAL SELECTION DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT, OR OTHER FEDERAL CIRCUIT AND DISTRICT COURTS. 13

III.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT ADDRESS ANY PRECLUSIVE EFFECT OF A SECTION 2 REMEDY IN THE CASE *SUB JUDICE;* ACCORDINGLY, THE COURT'S DISCUSSION OF *HOLDER V. HALL,* 114 S.CT. 2581 (1994) AFFORDS PETITIONERS NO SOLACE HERE. 14

IV.

THERE ARE NO UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO FLORIDA'S PARTIAL "MISSOURI PLAN" REQUIRING FURTHER ELUCIDATION BY THIS COURT. . . . 15

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition for writ of certiorari establishes that petitioners' argument is fundamentally flawed because it overlooks (1) this Court's role in reviewing judgments rather than statements in opinions, and (2) the fact that the distilled holding of the Eleventh Circuit is consistent with *Houston Lawyers' Association.*

Because this Court reviews judgments, the State may properly assert any grounds supportive of the Eleventh Circuit's judgment. The Eleventh Circuit's decision is that Florida's interests in maintaining its partial "Missouri Plan," involving at-large elections and merit selection nominating commission system for filling vacancies in the state's trial judiciary, as a matter of law, outweighs petitioners' vote polarization evidence submitted at trial. This particularized fact-based, intensely localized determination precludes any showing of decisional conflict. In short, different vote dilution evidence weighed against different state interests for different judicial systems in petitioners' cited authorities vitiates any claim of decisional conflict with the case *sub judice.*

Contrary to petitioners' claim, the Eleventh Circuit's holding is in conformance with this Court's precedent as to (1) the evidentiary weight given to the state's interests in its judicial structure, and (2) that under the particularized set of circumstances, the "totality of the circumstances" factor as to a state's interests *alone* may outweigh evidence of vote dilution in a judicial election case. *Houston Lawyers' Association v. Attorney General of Texas,* 501 U.S. 419 (1991). (See also *Thornburg v. Gingles,* 478 U.S. 30, 45 (1986) establishing that, under a totality of the circumstances analysis, it is not required that any number of factors be proved, and other factors not listed may be relevant.)

STATEMENT OF THE CASE

In preparing a petition for a writ of certiorari, petitioners are admonished that the Statement of the Case

> is the place for accurately summarizing the relevant facts and the treatment accorded those facts by the courts below. The facts to be set forth, moreover, include more than just those favorable to the petitioner's case.... The unfavorable facts, as well as those in dispute (and so labeled), must be given whenever necessary to a proper and full understanding of the case by the Court, but, if possible they should be placed in a context suggesting why they are not controlling. The aim, in short, is to construct a Statement so complete yet succinct, so relevant yet fair, that the Court can be assured that it has the facts essential to a resolution of the petition for certiorari.

Stern, Robert L., et al., *Supreme Court Practice 7th Edition,* Bureau of National Affairs, Inc. (1993).

Petitioners' Statement falls short of this admonition in several respects, thereby requiring respondents to point out those pertinent facts as found by the District Court and the Eleventh Circuit Court of Appeals.[1]

First, petitioners mischaracterize as "severe" the degree of racially polarized voting evidence they submitted (pet. pg. 2) when, in fact, that adjective does not appear in the courts' decisions. See App. at 23a, 90a–92a, 28c–29c.

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1 The lengthy recitation of facts is necessary in order to fully apprise this Court of critical matters considered, evaluated and found, consistent with this Court's admonition that Section 2 cases are fact-intensive, requiring courts to conduct a "searching practical evaluation of the 'past and present reality' " of the challenged electoral process. *Gingles,* 478 U.S. at 45.

Rather, petitioners demonstrated only a strong *inference* of racial vote dilution, app. at 99a, based on evidence of racial bloc voting. App. at 100a. Racial bloc voting, however, is only circumstantial evidence of community racial bias, app. at 62a, and such evidence addresses only the second and third necessary preconditions espoused in *Gingles*. App. at 90a. A defendant may rebut this circumstantial evidence by showing that voting is not based on race. App. at 63a.

These findings are based on the Eleventh Circuit's review of the six elections petitioners offered as proof of a Section 2 violation.[2] App. at 99a–100a. However, in addressing respondents' rebutting evidence, the Court found that incumbency, app. at 20a and 94a, and lack of significant legal experience of one candidate, app. at 95a fn. 85, were non-racial factors in the chosen elections.

Second, petitioners' reference to testimony regarding the futility of additional black candidates running for judicial office (pet. pg. 2) overlooks the District Court's contrary determination on this point:

> There was testimony that a perception exists among the black community that the judicial system is an exclusive white-male club, and that it is difficult for blacks to obtain just treatment in the judicial system. This perception was alluded to by a sitting black circuit judge and a prominent local black attorney. Witnesses also agreed that this perception is erroneous in that the circuit and county judges are fair, be they white or black.

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2 It is noted that the Eleventh Circuit's findings are based on its analysis of election results; yet, the Court rejects petitioners' seminal argument that a violation of Section 2 is established merely by proving numerical differences in representational levels; i.e., disparate election returns. App. at 45a – 46a.

> The Voting Rights Act is not directed to "perceptions" about the "system." Instead, the Act is directed to remedy inequalities in voting where the minority group has less opportunity to participate in the political process and to elect representatives of their choice. Thus, the perception about the judicial system that exists in the black community is irrelevant to this case. *The evidence suggests that it is also inaccurate.* Furthermore,...eligible blacks are actually represented in the judiciary in a greater proportion than eligible blacks are represented in the local bar, *a fact which directly contradicts the minority groups' erroneous perception about the judiciary.* (Emphasis added.)

App. at 44c–45c. The Eleventh Circuit shares this view. App. at 111a.

Third, petitioners' claim that black citizens presently suffer from the past effects of racial discrimination (pet. pg. 4) flies in the face of the District Court's specific findings that "(s)tatistics on political participation indicate that Florida's history of discrimination has no cognizable current impact on black voters' current ability to participate in the political process." App. at 38c. Moreover, "the ability of black voters to participate effectively in the political process for electing circuit and county judges is not materially affected by the continuing socio-economic effects of past discrimination.... (B)lack voters are actually registered at a higher rate than white voters, and there is no evidence to indicate that the lingering effects of discrimination have any material effect on black voter (participation)." App. at 39c–40c.

Fourth, petitioners' claims regarding the size of the election districts, majority vote requirement, numbered-place system,

use of staggered terms, and candidate filing fees were specifically rejected by the District Court.

As to district size, the court found that the districts "are not unreasonably large" and "no showing has been made that the size of these election districts has any adverse effect on black voter turnout.... Similarly, there is no convincing evidence that the size of these election districts impedes black judicial candidates in any material way." App. at 36c.

With regard to majority vote, numbered place, and staggered terms, the District Court specifically found

> that Florida has a valid interest in requiring that a successful judicial candidate gain the support of the majority of the voters. The requirement also works to help black and white incumbent judges remain in office, because the name recognition provided by incumbency provides the incumbent a substantial advantage in gaining majority support.

App. at 37c.

The court further found that

> (t)he use of a numbered place system furthers the State's interest in reducing the number of contested judicial elections, by not pitting incumbent judges against each other in each election. Furthermore, the numbered place requirement helps black and white voters to elect judges of their choice by protecting both black and white incumbent judges when facing a contested election at the expiration of each term.

Id.[3]

As to the costs of running for judicial office, the District Court specifically found that such costs

> are not a significant barrier to prospective black candidates. Because the costs of maintaining a judicial campaign...are small in comparison to most non-judicial elections, the economic disparities between blacks and whites are largely immaterial to the election of circuit and county judges. In addition, the filing fees for judicial candidates are not "enormous"...and can be avoided altogether by a petition method...or can be paid with funds obtained from local lawyers or other sources.

App. at 40c.

The Eleventh Circuit conducted an analysis and made specific findings regarding Florida's partial "Missouri Plan"—a matter omitted from petitioners' Statement of the Case. After explaining how Florida's trial judges are selected under this system, the Court concluded that

> (t)hese changes in Florida's constitution were clearly designed to eliminate the vices of partisan, electoral politics from the process of selecting state court judges. The goal of merit selection of judges, naturally, is to insulate them from popular pressure and to make them more willing to decide an unpopular case fairly and impartially while, at the same time, raising the level of qualifications of judicial officers.

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3 Significantly, the Eleventh Circuit found that black judges, who were appointed to the Jacksonville area judiciary under Florida's merit selection system "roughly in proportion to the number of minority applicants(s)...have enjoyed the same benefits of incumbency as their white counterparts...." App. at 28a-29a.

App. at 13a.

Pointedly, the Court specifically considered the role of race in Florida's creation and maintenance of its current structure for selecting trial judges by finding that

> (r)acial concerns did not inform the creation of Florida's judicial circuits or its counties; nor did race play a role in the State's decision to link the judge's territorial jurisdiction and electoral base and to require the judges to reside within their jurisdictions. Similarly, racial concerns did not prompt the several judicial reforms that have taken place over the past twenty-four years. In the main, those reforms were adopted to remove the judiciary from the evils of party politics, to enhance the independence of the judiciary, and to improve the overall quality of the bench.

App. at 101a–102a.

With these facts properly included in the Statement of the Case, this Court can now readily determine that the Eleventh Circuit's decision is based on the weighing of petitioners' particularized evidence of vote dilution against Florida's specific choice of a partial "Missouri Plan" as analyzed as a matter of law from the foundation of this Court's precedent. The result of that exhaustive, fact-intensive, intensely localized inquiry conforms to this Court's Section 2 jurisprudence, *Gingles,* 478 U.S. at 79; *Houston Lawyers, supra,* and establishes neither decisional conflict, precedential extension, nor the existence of unresolved issues mandating resolution.

REASONS FOR DENYING THE WRIT

By its fact-intensive, intensely localized analysis, the Eleventh Circuit concluded consistent with *Houston Lawyers' Association v. Attorney General of Texas,* 501 U.S. 419 (1991), that under Section 2 of the Voting Rights Act, Florida's interests in maintaining a partial "Missouri Plan" involving at-large elections for trial judges and merit selection nominating commission system for filling vacancies, is sufficiently strong as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have shown below. Accordingly, there is neither decisional conflict, an erroneous extension of this Court's precedent, nor are there any unresolved issues of national importance requiring this Court to further explicate the "appropriate standards" already contained in this Court's precedent.

I.

UNDER SECTION 2 OF THE VOTING RIGHTS ACT, FLORIDA'S INTERESTS IN MAINTAINING A PARTIAL "MISSOURI PLAN" INVOLVING AT-LARGE ELECTIONS FOR TRIAL JUDGES AND MERIT SELECTION FOR FILLING VACANCIES, ARE SUFFICIENTLY STRONG AS TO OUTWEIGH, AS A MATTER OF LAW, WHATEVER EVIDENCE OF VOTE POLARIZATION PETITIONERS MAY HAVE SHOWN BELOW.

Petitioners' first argument is based on a flawed view of the Eleventh Circuit's holding that a State's interests in its judiciary operate as an absolute bar to a Section 2 vote dilution claim, regardless of the degree or extent of vote dilution. Once having accepted this erroneous view of the

Eleventh Circuit's decision, petitioners continue their faulty analysis by declaring conflict with *Houston Lawyers' Association v. Attorney General of Texas.* As shown below, petitioners' initial argument is akin to the first in a row of arguments lined up like dominos; when that first argument/domino falls, as it does here, it necessarily knocks down the others.

The bulk of petitioners' argument takes to task Chief Judge Tjoflat's opinion, declaring it in conflict with *Houston Lawyers;* violative of "the strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination in the election process"; pet. pages 13 and 14, and accusing him of engaging in "speculation" as to remedial possibilities. Pet. pg. 18.[4]

What petitioners overlook in their castigation of several statements in Chief Judge Tjoflat's opinion is that "(t)his Court 'reviews judgments, not statements in opinions,' " *Johnson v. DeGrandy,* 114 S. Ct. 2647, 2653 fn. 5 (1994) (citing *California v. Rooney,* 483 U.S. 307 (1987)). Accordingly, "(t)he State is entitled to 'urge any grounds which would lend support to the judgment below,' " *id.,* quoting *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1977).

The "judgment" is the Eleventh Circuit's affirmance of the District Court's decision concluding that Florida's interests in maintaining its partial "Missouri Plan" for judicial selection, as a matter of law, outweighs petitioners' vote polarization evidence submitted in the form of six elections chosen by them. App. at 113a. Thus, the Eleventh Circuit's judgment,

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4 It is interesting to note that after petitioners criticize Chief Judge Tjoflat for engaging in "speculation", they conclude their argument by declaring his statement regarding a "system of separate justice" as being wrong, relying wholly on matters not embraced in the record of this cause and therefore of some degree of speculation itself. Pet. pg. 20.

rather than being in conflict with *Houston Lawyers,* as petitioners contend, is in fact wholly in harmony with that decision because that case specifically recognizes that a state's interests in its judiciary may be sufficiently strong so as to outweigh whatever evidence of vote dilution offered by a plaintiff. 501 U.S. 426; app. at 113a (pet. pgs. 27-28); *League of United Latin American Citizens (LULAC) v. Cle*ments, 999 F.2d 831, 870 (5th Cir. 1993) *(en banc), cert denied,* 114 S. Ct. 878 (1994).

That the Eleventh Circuit's decision conforms to *Houston Lawyers* is further demonstrated by recognizing and applying certain truths which are readily distilled from Section 2 jurisprudence.

First, such litigation is intensely fact-based and case-specific wherein a plaintiff must establish the three necessary preconditions as a threshold, and then go forward and prove its case by meeting the "totality of the circumstances" standard. *Johnson v. DeGrandy,* 114 S. Ct. at 2657; app. at 37a–40a. The subject of racially polarized voting is addressed initially by numbers two and three of the necessary preconditions. The failure to meet all three preconditions precludes the necessity for a totality of the circumstances analysis. When the totality factors are analyzed, no one factor is more preclusive of any other. In other words, the list of totality factors is not exhaustive; it is not required that any particular number of these factors be proved, and there may be other factors that are not listed which are relevant. *Gingles, supra.* Second, with respect to judicial elections, there is an additional factor—the state's particularized interests in maintaining its judiciary. *Houston Lawyers' Association, supra.* Third, the issue of a state's interests in its judiciary is a legal one for the court to resolve. *LULAC,* 999 F.2d at 871.

From the above, it is possible that, as a matter of law, a state's interests in maintaining its judiciary will outweigh a vote dilution claim, depending upon the relative weight of the state's interests and the relative weight of the particularized vote dilution evidence. This type of intensely localized analysis, undertaken by the Eleventh Circuit, is in strict harmony with this Court's Section 2 jurisprudence as it relates to judicial elections. *Houston Lawyers; LULAC.*

While it is true that this Court, in *Houston Lawyers' Association,* concluded that a state's interests in maintaining its particular judicial structure "is merely one factor to be considered in evaluating the 'totality of circumstances,' (and) that interest does not automatically, and in every case, outweigh proof of racial vote dilution[,]" 501 U.S. at 427, it is equally true, as noted above, "that the state interest *could* outweigh what would otherwise be proof of an illegal dilution and thus foreclose liability." *LULAC,* 999 F.2d at 870.

Indeed, *Houston Lawyers* specifically recognizes that a state's interests in its judiciary alone may preclude a vote dilution claim and, even where such a claim is made, may preclude a remedy that involves redrawing boundaries. *Houston Lawyers,* 501 U.S. at 426, pet. pgs. 27-28. Therefore, while under both *Houston Lawyers* and *LULAC* a state's interests in maintaining its judiciary will not automatically outweigh proof of racial vote dilution, these cases recognize that, depending upon the relative weight of the state's interests and the evidence of vote dilution, the state's interests alone may be sufficiently strong so as to overcome a vote dilution claim; it may thus be the most significant or even the determinative factor, again depending upon the strength of the interests and weakness of vote dilution evidence.

The record in this case demonstrates that the latter is precisely what has occurred here; the Eleventh Circuit,

upon review of petitioners' vote dilution evidence, found that the evidence was not sufficiently strong to overcome Florida's strong interests in its partial "Missouri Plan." The Eleventh Circuit's analysis of the state's interests as against petitioners' vote dilution evidence led that Court to conclude that, as a matter of law, petitioners had not made out a Section 2 violation. This stands in stark contrast to petitioners' bold—and erroneous—assertion that the Eleventh Circuit blindly rejected petitioners' vote dilution claim solely because the state offered only a self-serving interest supportive of its judicial structure.

The Eleventh Circuit spent a considerable amount of judicial labor discussing Florida's judiciary. *See* Statement of the Case and app. at 10a-13a. The Eleventh Circuit, consistent with *LULAC,* resolved the legal question by weighing the state's interests in its partial "Missouri Plan" against the evidence petitioners submitted during trial, and concluded that Florida's interests outweigh whatever evidence petitioners presented to the District Court.

Because *Houston Lawyers' Association* does not foreclose a court's finding that the substantiality of a state's interests may outweigh the particularized vote dilution evidence presented in a given case (and, in fact, *Houston Lawyers' Association* recognizes that there may well be cases in which the state's interests alone will be sufficient to outweigh a plaintiff's vote dilution evidence), the Eleventh Circuit's en banc decision is in harmony with *Houston Lawyers' Association, LULAC,* and *Gingles.*

The facts set out above are case-specific and intensely localized; the legal principles applied to these facts are clearly derived from this Court's precedent. There is no dispute between the Eleventh Circuit and District Court that Florida's interests in its judiciary outweigh petitioners'

evidence of vote dilution. App. 7a–13a, 103a–112a, 23c–26c, 45c–46c.

Petitioners' argument thus is without merit.

II.

THE ELEVENTH CIRCUIT'S PARTICULARIZED HOLDING AS TO THE WEIGHT ACCORDED FLORIDA'S PARTIAL "MISSOURI PLAN" FOR JUDICIAL SELECTION DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT, OR OTHER FEDERAL CIRCUIT AND DISTRICT COURTS.

The analysis in Part I above demonstrates that petitioners' claim of conflict with this Court's precedent, as well as decisions of other federal circuit and district courts, is without foundation. The Eleventh Circuit's state interests analysis is essentially the same as was involved in *Houston Lawyers' Association,* app. at 101a, with the caveat that Florida's partial "Missouri Plan" eliminates partisan judicial elections, whereas Texas's system calls for partisan election of judges. Thus, Florida's interests in its particularized judiciary are even stronger than those asserted in *Houston Lawyers' Association* because of the elimination of partisanship. App. at 101a–102a. In fine, none of the cases cited by petitioners as being in conflict with the Eleventh Circuit's decision deals with the same quantum of evidence weighed against the same state interests as the case at bar. Because of different vote dilution facts weighed against different judicial structures and the state interests supporting them in petitioners' cited authorities, those cases are distinguishable from, and therefore cannot be in conflict with, the Eleventh Circuit's decision here.

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III.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT ADDRESS ANY PRECLUSIVE EFFECT OF A SECTION 2 REMEDY IN THE CASE *SUB JUDICE;* ACCORDINGLY, THE COURT'S DISCUSSION OF *HOLDER V. HALL,* 114 S.CT. 2581 (1994) AFFORDS PETITIONERS NO SOLACE HERE.

Petitioners take issue with Chief Judge Tjoflat's analysis of *Holder v. Hall.* However, a careful reading of Judge Edmondson's concurring opinion demonstrates that Chief Judge Tjoflat's analysis does not represent the decision of the Court. Additionally, the discussion reiterates that a consideration of the state's interests in its judicial structure is important at both the liability and remedy stages, app. 94a; that this consideration cannot be separated. App. 76a.[5]

The concurring judges understand that the holding of the case is contained in Part V of the opinion, app. at 103a–112c; part V, however, contains only a discussion of the deficiencies of petitioners' suggested remedies; it does not contain Chief Judge Tjoflat's discussion of *Holder v. Hall* which appears in Part III of the decision.

The Court's discussion of the remedial deficiencies only buttresses the Court's ultimate decision. This is so because when these deficiencies are added to Florida's heightened interests in its judicial system and balanced against petitioners' vote polarization evidence, the propriety of the Eleventh Circuit's rejection of petitioners' Section 2 claim is evident.

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5 Pointedly, this Court, in *Houston Lawyers,* specifically found that the state's interests in its judiciary "are relevant" at *either* the liability or remedy stages, 501 U.S. at 426.

Because the Eleventh Circuit did not find a Section 2 violation under *Gingles* and *DeGrandy,* nothing in the decision purports to hold that petitioners established a Section 2 violation for which there can be no remedy.

Indeed, woven throughout the Eleventh Circuit's decision is the rejection of the *sine qua non* of petitioners' claim that racially disparate vote totals *ipso facto* presupposes both the three necessary preconditions and enough of the totality standard so as to make out a voting rights violation, app. 45a–46a, thereby requiring a state to alter its judiciary based solely on racial considerations. The Eleventh Circuit never held that petitioners met the totality requirements; rather, the Court found only evidence of disparate elections results—evidence that the Court itself rejected. *Id.*

Thus, petitioners' continued disagreement with certain statements in Chief Judge Tjoflat's opinion offers them no solace here. *Johnson v. DeGrandy, supra.*

IV.

THERE ARE NO UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO FLORIDA'S PARTIAL "MISSOURI PLAN" REQUIRING FURTHER ELUCIDATION BY THIS COURT.

Petitioners contend that there remains unresolved the question of whether the state's interests in its judiciary are relevant at the liability stage or at the remedy stage. As demonstrated in Part III above, this Court has already determined that this inquiry is relevant at either stage. Of equal import, however, is that by asking this Court to address this issue, petitioners actually seek an advisory

opinion. This is so because, based on the evidence they presented at trial as against the interests Florida has in its partial "Missouri Plan" method of judicial selection, the Eleventh Circuit, in harmony with *Houston Lawyers* and *LULAC,* found that as a matter of law, petitioners did not make out a vote dilution claim regardless of when the state interests are examined. Therefore, for the purpose of the case *sub judice,* it makes no difference when the analysis was undertaken for, as Judge Edmondson points out in his concurring opinion:

> The State of Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral basis of its trial judges [under its partial "Missouri Plan"] is, as a matter of law, great and outweighs *(either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here.* (Emphasis supplied.)

App. at 113a.

As noted above, this Court's Section 2 jurisprudence holds that, depending upon the particularized facts of a given case, the state's interests in maintaining its judiciary may outweigh the particular evidence presented of vote dilution. *Houston Lawyers.* This is precisely what occurred in the case *sub judice.* No broad principles were espoused; the Court simply applied the facts presented by petitioners below to the law as articulated by this Court. In this light, it is unnecessary to accept petitioners' request for an advisory opinion.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 94-1463

In the Supreme Court of the United States

OCTOBER TERM, 1994

JESSE L. NIPPER, ET AL., PETITIONERS

v.

JIM SMITH, SECRETARY OF STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, under Section 2 of the Voting Rights Act, a State's interest in maintaining at-large election districts for trial court judges precludes any remedy as a matter of law, without regard to the severity of the racial vote dilution shown by the evidence.

2. Whether a State's interest in maintaining existing at-large election districts for trial court judges is relevant at the liability stage of a lawsuit under Section 2, or only at the remedy stage, and, if relevant at the liability stage, what weight it should carry.

3. What the appropriate standards are for evaluating a Section 2 vote-dilution challenge to at-large election districts for state trial court judges.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case involves the question whether plaintiffs who show that a State's at-large, numbered-post system of electing its trial court judges dilutes minority voting strength under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, have nonetheless failed to prove a violation of Section 2 unless they have also, as part of their prima facie case, identified a remedy "within the confines of the state's judicial model." See Pet. App. 77a. The Attorney General has primary responsibility for enforcing Section 2. See 42 U.S.C. 1973j(d).

This case will also affect the Attorney General's preclearance responsibilities under Section 5 of the

Voting Rights Act, 42 U.S.C. 1973c. Jurisdictions covered by Section 5 must submit changes affecting judicial elections to the Attorney General for preclearance. See *Clark* v. *Roemer*, 500 U.S. 646 (1991). The Procedures for the Administration of Section 5, 28 C.F.R. Pt. 51, expressly require the Attorney General to interpose an objection whenever necessary to prevent a clear violation of Section 2. See 28 C.F.R. 51.55(b)(2). The United States is currently defending four Section 5 declaratory judgment proceedings seeking preclearance of additional at-large judgeships.[1]

The United States filed briefs as amicus curiae in the court of appeals at both the panel and en banc stages of this case; we also participated in oral argument before the en banc court. The United States was a party in *Chisom* v. *Roemer*, 501 U.S. 380 (1991), which considered whether Section 2 applies to the election of judges, and the United States also participated as amicus curiae in *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991), which held that Section 2 applies to the election of state trial court judges.

STATEMENT

1. This case is a challenge to Florida's system for electing judges to both tiers of the state trial courts in two overlapping jurisdictions in the Jacksonville, Florida, area: the Fourth Judicial Circuit Court, which has 28 judgeships, and the Duval County Court, which has 12. Pet. App. 3a, 7a, 8a. Duval County, which encompasses

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[1] See *Georgia* v. *Reno*, No. 90-2065 (D.D.C. Feb. 3, 1995) (three-judge court) (notice of appeal filed Mar. 6, 1995); *New York* v. *United States*, No. 94-2219 (Dec. 22, 1994) (three-judge court) (finding no Section 5 violation), motion for reconsideration denied (D.D.C. Mar. 16, 1995); *Arizona* v. *Reno*, No. 94-2054 (D.D.C.) (three-judge court); *Texas* v. *United States*, No. 1:94-CV01529 (D.D.C.) (three-judge court).

Jacksonville, is one of three counties comprising the Fourth Judicial Circuit. *Id.* at 3a. Florida's circuit courts have general trial jurisdiction over civil and criminal matters; the jurisdiction of the county courts is restricted to misdemeanor and small claims cases assigned to those courts by statute. *Id.* at 7a.

Judges on the circuit and county courts are elected to six- and four-year terms, respectively. Pet. App. 7a; Fla. Const. Art. 5, § 10(b). Voting is at-large with numbered places and a majority vote requirement for election. Pet. App. 7a-8a. Thus, although each circuit or county judge has circuit-wide or county-wide venue responsibilities, and all voters within the circuit or county are eligible to vote in each of the circuit or county judgeship elections, the seats are filled by separate mini-elections. Pet. App. 7a-8a & n.4. Each candidate for a judgeship must select and contend for a particular numbered position within the multimember court and receive the majority of votes cast for that position. *Ibid.*

Although open seats on the two courts are filled by election, Fla. Const. Art. 5, §§ 10(b), 11(b), the Governor has authority to fill vacancies that occur between elections by choosing from a list of candidates prepared by a judicial nominating commission. Fla. Const. Art. 5, § 11(b); see Pet. App. 8a, 11a-13a. Approximately half of the judges who joined the Duval County and Fourth Judicial Circuit courts after the system was modified in 1976 to provide for mid-term appointments initially reached office by the appointment process.[2] Most judicial incumbents—including those initially appointed to office by the Governor—are unopposed for reelection. *Id.* at 20a, 87a.

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[2] At the time of trial, 17 of the 28 sitting Fourth Judicial Circuit Court judges had been appointed, as had five of the 12 sitting Duval County Court judges. Pet. App. 25c.

No black judge has ever won a contested judicial election in either the Fourth Judicial Circuit or Duval County. Since 1972, black candidates have run in contested elections for judgeships on the two courts a total of five times. Each time, the black candidate has lost in an election marked by racial bloc voting. Pet. App. 13a-19a. Before this lawsuit was filed, only one black judge had ever served on the Fourth Judicial Circuit Court and only one on the Duval County Court. *Id.* at 8a-9a. Both initially obtained their seats by appointment, and they, like most white incumbent judges, were not opposed for reelection. *Id.* at 16a, 20a. One additional black judge was appointed to the Duval County Court after this suit was filed. Pet. 2; Pet. App. 9a n.7.[3]

Blacks are significantly underrepresented on the Fourth Judicial Circuit Court when compared to the voting-age population in the jurisdiction as a whole. At the time of trial, the voting-age population of the Fourth Judicial Circuit was 19% black, but only one out of the 28 judges (or 3.5%) on the circuit court was black. Blacks are also underrepresented on the Duval County Court. Blacks constitute 22% of the voting-age population of Duval County, but only two out of the 12 judges (or 16%) on that county's court were black. Pet. App. 8a-9a.

Plaintiffs are black citizens living in the Fourth Judicial Circuit and Duval County, and a local organization of black attorneys. In 1990, they filed suit in the United States District Court for the Middle District of Florida to challenge the judicial election system in the

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[3] A fourth black judge was appointed—the second appointed to the Fourth Judicial Circuit Court—after the trial concluded, but that appointment was not made part of the district court record, was not considered by the courts below, Pet. App. 9a n.6, and is not considered here.

County and Circuit under Section 2 of the Voting Rights Act. On June 2, 1992, following a trial, the district court entered judgment in favor of the defendants. See Pet. App. 1c-54c. The court held that the plaintiffs had failed to demonstrate vote dilution in violation of Section 2. The court concluded that plaintiffs met the first precondition required by *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), because they "demonstrated that blacks are a sufficiently large and geographically compact group to constitute a majority in a subdistrict." Pet. App. 28c. The court found no racially polarized voting, *id.* at 28c-36c, however, and held that, even if racial polarization were shown, the defendants rebutted that showing by demonstrating that the electorate was not "driven by racial bias," *id.* at 36c. Because the court found no liability, it did not reach the question of remedy.

2. A panel of the Eleventh Circuit reversed and remanded for the imposition of a remedy. Pet. App. 1b-26b. The full court, however, voted to rehear the case en banc, *Nipper* v. *Smith*, 17 F.3d 1352 (1994). The en banc court of appeals affirmed the district court by a 6-2 vote, with three judges recused. Pet. App. 1a-142a.

a. Except with respect to Parts III(A) and III(B)(1) of the opinion written by Chief Judge Tjoflat, see pp. 6-7, *infra*, there was no majority opinion. Writing for himself and Judge Anderson, Chief Judge Tjoflat concluded that the district court had erred in finding no vote dilution. In his view, the Section 2 results test requires plaintiffs to show "that a voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the minority population's voting strength." Pet. App. 63a. He found that plaintiffs had met that test. *Id.* at 90a-102a. Judge Hatchett, dissenting, joined by Judge Kravitch, agreed that vote dilution had occurred, *id.* at 114a-132a, although he rejected Chief Judge Tjoflat's

requirement that plaintiffs show racial bias in the voting community. In his view, they need only show that the challenged system "operate[s] to disparately impact the ability of minority voters to elect their preferred candidates on account of race." *Id.* at 116a. The remaining four judges participating in the en banc decision assumed without deciding that dilution could be shown. *Id.* at 113a.

b. A majority of the court of appeals nonetheless held that respondents were not liable. They concluded that the State's interest in maintaining its electoral system in its present form prevented any finding of a Section 2 violation despite the existence of vote dilution.

In the portions of Chief Judge Tjoflat's opinion in which six judges joined (Parts III(A) and III(B)(1)), the court held that the traditional *Gingles* vote-dilution inquiry should be altered in challenges to judicial elections. Pet. App. 70a-82a. This Court in *Chisom* v. *Roemer*, 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991), held that vote-dilution claims involving judicial elections are covered by Section 2, but did not set forth the standards to be applied in such cases. The court of appeals formulated a Section 2 rule under which the plaintiff must identify a feasible remedy as "part of the plaintiff 's prima facie case." Pet. App. 76a. That remedy must, in addition, be "within the state's judicial model." *Id.* at 78a.

The court arrived at that standard by reading the first of the three preconditions set forth in *Gingles* to require the district court to determine "whether it can fashion a permissible remedy in the particular context of the challenged system." Pet. App. 76a. In *Gingles* itself, a showing of a sufficiently large and geographically compact legislative subdistrict satisfied the first of the three *Gingles* preconditions. The court held, however, that such a showing was inadequate to satisfy the first *Gingles*

precondition in a challenge to *judicial* elections. *Id.* at 78a. Rather, "[i]n judicial cases, * * * single-member districts may run counter to the state's judicial model." *Ibid.* Plaintiffs thus must prove that, "within the state's judicial model, there exists an alternative election scheme that could serve as an appropriate section 2 remedy." *Ibid.*

In reaching that conclusion, the court relied heavily on the statement in *Holder* v. *Hall*, 114 S. Ct. 2581 (1994), that a court considering a vote-dilution challenge "must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." Pet. App. 79a. If no "objective and workable standard for choosing a reasonable benchmark" exists, the court reasoned, "it follows that the voting practice cannot be challenged as dilutive under § 2." *Id.* at 81a-82a (quoting *Holder*, 114 S. Ct. at 2586 (plurality opinion)). Plaintiffs thus could not prove a Section 2 violation unless they could identify a remedy that retained the State's "judicial model."

c. In two separate opinions, a total of six judges then concluded that none of the remedies suggested by the plaintiffs could be adopted while maintaining the State's current "judicial model."[4] See Pet. App. 103a-112a; *id.* at 113a.

Chief Judge Tjoflat, in a portion of his opinion joined only by Judge Anderson, considered and rejected three alternative potential remedies. He first rejected subdistricting. Plaintiffs had introduced evidence that a compact subdistrict, with a 60% black voting-age population, could be drawn in northwestern Duval County, and that the subdistrict's population would enable it to elect six out of the 28 circuit judges and three out of the 12 county court judges. *Id.* at 13c; *id.* at 104a & n.91. In Chief

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[4] As noted above, the question of remedy was not litigated in the district court.

Judge Tjoflat's view, however, "the State's interest in linking the jurisdictional and electoral bases of its circuit and county court judges" played "a major role" in consideration of whether an appropriate remedy could be fashioned. *Id.* at 103a. Chief Judge Tjoflat concluded that, by removing linkage, the subdistricting remedy would impermissibly alter the State's chosen balance between accountability and independence. *Id.* at 103a-108a.

Chief Judge Tjoflat next rejected the remedy of dividing the current Fourth Judicial Circuit into two or more smaller circuits. Pet. App. 108a-109a.[5] He acknowledged that such a remedy would preserve the system's current linkage, and that the new circuits could each have a larger population than at least one other existing circuit. *Id.* at 108a. Nevertheless, he concluded that dividing the circuit would be impractical because it would require a change in the State's venue rules (which are currently based on county lines) and it would alter the composition of jury pools. *Id.* at 108a-109a.

Finally, Chief Judge Tjoflat rejected the remedy of electing judges in the current districts by cumulative voting, without subdistricting. "Although cumulative voting would preserve linkage and avoid many of the concerns accompanying a subdistricting plan," he concluded that the drawbacks of such a remedy outweighed its benefits. Pet. App. 109a-110a. A cumulative voting scheme would require the State to abandon its numbered-post system. *Id.* at 110a. Eliminating numbered posts might, in turn, inject into incumbent judges' reelection campaigns an element of competition among them, and

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[5] Chief Judge Tjoflat did not address whether subdistricting for Duval County Court elections would be feasible because he believed that the Florida Constitution requires county courts to follow county lines. Pet. App. 108a n.92; see Fla. Const. Art. 5, § 6(a).

would thus "have a detrimental effect on the collegiality of the court's judges in administrative matters," and deter lawyers from seeking a judicial career. *Ibid.*

d. Judge Edmondson, in an opinion joined by Judges Cox, Birch, and Dubina, concurred in Chief Judge Tjoflat's opinion in part, and concurred in the result. Pet. App. 113a. Judge Edmondson joined in the portions of Chief Judge Tjoflat's opinion in which he discussed the requirement that plaintiffs show, as part of the first *Gingles* threshold factor, a remedy "within the state's judicial model." *Id.* at 78a; see *id.* at 70a-82a (Parts III(A) and III(B)(1)). Judge Edmondson agreed "that each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system." *Id.* at 113a.

e. Judge Hatchett, joined by Judge Kravitch, dissented. Pet. App. 114a-142a. They took issue with the majority for relying "almost entirely upon speculation and conjecture to support its holding that Florida's interest in conserving its current at-large voting system precludes any possible remedy the appellants or the district court can devise." *Id.* at 133a. In their view, the district court should have an opportunity to hear evidence on possible remedies and to make its own remedial determination in the first instance. *Ibid.* The dissent also challenged Chief Judge Tjoflat's bases for rejecting the three potential remedies considered by the Chief Judge. *Id.* at 135a-140a.

ARGUMENT

This case presents the question whether vote-dilution challenges to at-large judicial election systems are precluded wherever a remedy would require a change to some aspect of the State's "judicial model." The Eleventh Circuit held that, in such circumstances, no violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, can be

found. This Court should grant certiorari to establish that Section 2 can provide a remedy for vote dilution caused by an at-large system of electing judges even where the remedy might require some structural change in the at-large system. Although the State's interest in maintaining the challenged system should be considered as part of the analysis under Section 2, that interest should not be given preclusive effect. The en banc court's holding to the contrary conflicts with *Houston Lawyers Ass'n* v. *Attorney General of Texas*, 501 U.S. 419, 427 (1991), and seriously misconstrues *Holder* v. *Hall*, 114 S. Ct. 2581 (1994). The holding also will have a broad impact upon the ability of the United States to fulfill its enforcement obligations under Section 2 and Section 5, and thus warrants this Court's review.

1. The decision below severely restricts Section 2's effectiveness to ensure that, where States elect judges, the election systems are nondiscriminatory. The system in use in the jurisdictions involved in this case is currently employed by each of Florida's 20 judicial circuits and 67 counties. See generally Fla. Const. Art. 5, §§ 5, 6, 10(b), 11(b); Fla. Stat. Ann. § 34.022 (West Supp. 1995). Other States also use, either locally or on a state-wide basis, potentially dilutive at-large judicial election systems. Under the Eleventh Circuit's holding, all those systems apparently would be insulated from meaningful review under Section 2, no matter how serious their dilutive effect on minority voting rights. Section 2 challenges to systems for electing state judges are currently pending in eight States (including the three States that comprise the Eleventh Circuit).[6]

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[6] See *Cousin* v. *McWherter*, 46 F.3d 568 (6th Cir. 1995); *Brooks* v. *State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994); *Bradley* v. *Indiana State Election Bd.*, 797 F. Supp. 694 (S.D. Ind. 1992); *Southern*

2. a. The Eleventh Circuit's holding is in clear conflict with *Houston Lawyers' Ass'n*, *supra*. In that case, the State of Texas argued that its "linkage" interest in maintaining an at-large, jurisdiction-wide system of electing trial judges precluded any finding of a Section 2 violation. The Court rejected that argument. It specifically disagreed that trial judges were "automatically exempt[]" from the coverage of Section 2. 501 U.S. at 426. It held that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices," although legitimate, "does not automatically, and in every case, outweigh proof of racial vote dilution." *Id.* at 427.

Notwithstanding *Houston Lawyers' Ass'n*, the Eleventh Circuit's ruling creates a virtually automatic exemption from Section 2 for dilutive at-large judicial election systems. The court of appeals thus erroneously held that plaintiffs challenging such an election system under Section 2 must identify, as part of their prima facie case, a remedy "within the state's judicial model":

> In judicial cases, * * * single-member districts may run counter to the state's judicial model. Thus, the question under the first *Gingles* threshold factor may not be whether the minority group could constitute a majority in a single-member district, but whether, within the state's judicial model, there exists an

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Christian Leadership Conference v. *Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992), vacated, 18 F.3d 897 (1994), rehearing en banc granted, No. 92-6257 (11th Cir. Mar. 23, 1994); *Davis* v. *Chiles*, No. 90-40098-MP (N.D. Fla. Sept. 3, 1992); *De Yurre* v. *Chiles*, No. 94-1527 CIV KEHOE (S.D. Fla.); *Milwaukee Branch of the NAACP* v. *Thompson*, No. 94-C1245 (E.D. Wis.); *Trujillo* v. *California*, No. C-92-20465 RMW (N.D. Cal.); *Del Torro* v. *Cuomo*, No. 92-7739 (S.D.N.Y.); *Frances* v. *Cuomo*, No. 92-1144 (S.D.N.Y.).

> alternative election scheme that could serve as an appropriate section 2 remedy.

Pet. App. 78a.[7] It then applied that requirement in a manner that precludes Section 2 challenges to dilutive at-large judicial election systems, without regard to the severity of the discrimination caused by the State's system, wherever a remedy would require modification of that model. Under the court's holding, a plaintiff's failure to prove that vote dilution can be resolved "within the state's judicial model" automatically terminates the case regardless of the extent to which the State's "judicial model" dilutes minority voting strength, and regardless of the sorts of changes in the judicial model that would be required in order to remedy the dilution.[8]

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[7] The court cited *Houston Lawyers' Ass'n* for this proposition. The Court in *Houston Lawyers' Ass'n* commented that, "[e]ven if we assume, *arguendo*, that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts," that interest "does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test." 501 U.S. at 426. Rather, the Court suggested that "such a state interest is a factor to be considered by the court in evaluating *whether the evidence in a particular case* supports a finding of a vote dilution *violation* in an election for single-member office." *Ibid.* (emphasis added in part). The Court's statement properly emphasizes that voting rights violations and remedies must be determined in case-by-case, fact-specific adjudication, and correctly suggests that the State must offer proof of its own interests. The court of appeals, however, erroneously gave the "State's interests"—including some interests never even asserted by the State—preclusive effect as a matter of law, without conducting such an analysis.

[8] The other two circuits to have considered the question have, in contrast, explicitly recognized that even a substantial state interest in maintaining a "linkage" system "will not always defeat § 2 liability." *League of United Latin American Citizens* v. *Clements* (*LULAC*), 999 F.2d 831, 876 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994); accord *Cousin* v. *McWherter*, 46 F.3d 568, 577 (6th Cir. 1995). Unlike

b. In reaching its decision, the Eleventh Circuit incorrectly relied on *Holder* v. *Hall*, 114 S. Ct. 2581 (1994). The Court in *Holder* concluded, in the context of a challenge to a single-member county commission, that Section 2 does not encompass vote-dilution challenges to the size of government bodies. See *id.* at 2588 (plurality opinion); *id.* at 2589-2591 (O'Connor, J., concurring in part); *id.* at 2591 (Thomas, J., concurring in the judgment). The plaintiffs in *Holder* suggested that a multimember rather than a single-member commission was a feasible remedy that would allow minority voters to elect one or more commissioners of their choice. The plurality found that the degree of potential vote dilution caused by the single-member commission could not be assessed without an objective "benchmark" number of commissioners against which to measure the single-member commission. The plurality in *Holder* could find no principled reason to choose any particular size commission over any other: "Once a court accepts respondents' reasoning," advocating that the single-member commission be expanded to include more than one commissioner in order to create smaller electoral subdistricts, "it will have to allow a plaintiff group insufficiently large or geographically compact to form a majority in one of five districts to argue that the jurisdiction's failure to establish a 10-, 15-, or

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the Eleventh Circuit, which now puts plaintiffs to the burden of demonstrating the existence of a remedy "within the state's judicial model" as a threshold requirement, the Fifth Circuit in *LULAC* and the Sixth Circuit in *Cousin* both held that the state interests reflected in the current electoral system must be weighed against the plaintiffs' showing of dilution; sufficiently strong evidence of dilution could outweigh even a significant state interest in the current system. See *Cousin*, 46 F.3d at 577; *LULAC*, 999 F.2d at 876 (holding that proof of "substantial" dilution can outweigh State's interest in "linkage"). The decision below conflicts with those decisions.

25-commissioner structure is dilutive." *Id.* at 2590 (O'Connor, J., concurring in part). Because "[t]he wide range of possibilities makes the choice inherently standardless," *id.* at 2588 (plurality opinion) (internal quotation marks omitted), the Court found it impossible to determine whether a government body's size dilutes minority voting strength.

The Eleventh Circuit did not rely on *Holder* to find an absence of vote dilution;[9] rather, the court found dilution, but drew from *Holder* the much broader conclusion that federal courts cannot impose under the Voting Rights Act any remedy that would "alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.' " Pet. App. 80a-81a (quoting *Holder*, 114 S. Ct. at 2586). In the court's view, *Holder* thus requires that plaintiffs show "the existence of a workable remedy within the confines of the state's system of government," Pet. App. 81a—or, where election of judges is concerned, within the State's "judicial model," *id.* at 78a. The absence

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[9] *Holder* could not have been applied here to defeat the finding of vote dilution because this is among those cases in which, as the *Holder* court noted, the benchmark voting practices are "obvious," 114 S. Ct. at 2586 (plurality opinion), or "self-evident," *id.* at 2589 (O'Connor, J., concurring in part) (noting that, "[i]n a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts"); see also *Thornburg* v. *Gingles*, 478 U.S. 30, 38, 50 & n.17 (1986). It was only because the plaintiffs in *Holder* claimed that the size of the governmental body was the dilutive practice that the plurality could find no principled reason to choose any particular benchmark over any other. Here, the size of the circuit and county courts would remain the same under each of the alternative remedies.

of such a remedy, the court held, forecloses liability as a matter of law. *Id.* at 81a-82a, 113a.

The Eleventh Circuit's unwarranted expansion of *Holder* misconceives the appropriate role of the State's interest under Section 2. It has long been the rule that, where vote dilution exists, some alteration in the State's election system may be called for in order to remedy the violation. To be sure, a remedy for a voting rights violation must not "intrude upon state policy any more than necessary." *Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971); see also *Upham* v. *Seamon*, 456 U.S. 37, 42-43 (1982) (per curiam); *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973). This Court has therefore recognized that a State should be given the first opportunity to propose a remedial plan, and a district court's modifications of such a plan should be "limited to those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43 (per curiam). Nonetheless, a finding of minority vote dilution under Section 2 ordinarily requires a remedy.[10] Neither the existence of several remedial options nor the fact that an adequate remedy may require some alteration of the State's system properly forecloses relief. Thus, while the State's interest in retaining its existing "judicial model" might appropriately be considered at the remedial stage of the case—or perhaps weighed as part of a court's evaluation of the "totality of the circumstances" in determining whether dilution has occurred—neither *Holder* nor any other authority justifies the Eleventh Circuit's decision entirely preventing courts from even

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[10] See S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982) ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.").

considering evidence of vote dilution unless the plaintiff proffers a remedy that requires no changes in the State's "judicial model."

c. The manner in which the Eleventh Circuit applied its "judicial model" rule in this case illustrates the essentially conclusive deference that the rule improperly accords to States' asserted interests in maintaining their particular judicial models.

The district court heard very little evidence on the State's interests in preserving the various relevant aspects of Florida's current judicial model.[11] That court made no factual findings regarding those interests, nor did it weigh them among the "totality of the circumstances" in evaluating plaintiffs' vote-dilution claim. The district court also did not consider any remedial questions. After reversing the district court's holding that no vote dilution occurred, the court of appeals did not remand to allow the district court to consider the nature and strength of the State's interests in the particular circumstances of this case. See Pet. App. 103a & n.90, 112a, 113a. Instead, the Eleventh Circuit employed a kind of minimum-level rational basis scrutiny, permitting judicially identified post-hoc rationalizations to override a demonstration of dilution of minority voting rights. Cf. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). The court of appeals

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[11] The only evidence the State presented to support its linkage interest and justify the at-large election of judges was the conclusory testimony of two witnesses. Fourth Judicial Circuit Chief Judge Santora testified that electing judges from small subdistricts would affect judicial impartiality. Tr. 195-196 (Dec. 16, 1991). Another Fourth Judicial Circuit judge testified that he favors the current at-large system because he does not think of himself as a representative with a "constituency." *Id.* at 129-131. That testimony falls far short of establishing that the current system is necessary to promote judicial independence.

conducted no meaningful factual scrutiny of the strength of Florida's asserted interests, the consistency with which the State seeks to advance those interests, or the necessity of maintaining every aspect of the current electoral system in order to vindicate them. That approach is entirely inconsistent with the sensitive contextual, fact-specific inquiry that this Court requires in assessments of vote-dilution claims under Section 2. See *Gingles*, 478 U.S. at 45, 79.

Florida here asserted only one interest in support of the current at-large system of judicial elections—an interest in "linkage." See Pet. App. 101a. The State claimed that it had a strong interest in maintaining a perfect "link" between an elected trial judge's "jurisdiction" and his or her elective base, because "linkage" assertedly balances the accountability and independence of elected judges by ensuring that they are answerable to all the voters within the elected judge's area of primary venue responsibility and by preventing them from being beholden only to narrow factions within that area. *Ibid.* Because a sub-districting remedy would disrupt that "linkage," the court concluded that it was categorically impermissible.

Chief Judge Tjoflat did not consider the evidence before the district court demonstrating that Florida has neither consistently sought to advance the interests that linkage purportedly serves, nor even strictly maintained linkage. The undisputed testimony from both sides, for example, was that judges under the current system frequently decide cases involving litigants from outside their electoral base, and that judges take great pride in treating all litigants fairly. Tr. 129-131, 198-200 (Dec. 16, 1991); Tr. 6-11 (Dec. 18, 1991). The current system also permits judges elected in one jurisdiction to preside over cases in another. Fla. Stat. Ann. § 26.57 (West 1988).

Chief Judge Tjoflat also improperly rejected the possibility that a vote-dilution remedy could wholly or partly preserve existing forms of linkage. The plaintiffs had proposed, as an alternative to their subdistricting remedy, that the current Fourth Judicial Circuit could be divided into two or more smaller circuits. As Chief Judge Tjoflat acknowledged, within each of those circuits, linkage would be maintained. Nevertheless, he rejected that alternative by identifying interests which the State itself had not—*e.g.*, that creating new districts would "require a modification of Florida's [county-based] venue rules" and would "alter the composition of the courts' jury pools," Pet. App. 108a-109a, and that departing from the numbered-post rule would force sitting judges to stand for reelection against one another, *id.* at 110a. However, the district court heard no evidence or argument regarding why the numbered-post rule is necessary, why a satisfactory modification of existing venue rules could not be made, nor why jury pools could not either remain as they are or fairly be constituted in some alternative manner.[12]

The Eleventh Circuit's "judicial model" rule thus effectively recognizes a state interest, sufficiently strong to preclude liability altogether, in nearly every facet of a State's trial court system. Under the circuit's rule, for example, "judicial model" status might be accorded to exceptionally large electoral districts (based on the rationale that large district size promoted judicial independence) or to majority or super-majority vote requirements (based on the rationale that such requirements would ensure that judicial power is given

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[12] Florida law appears to grant considerable latitude to the chief judge to determine the boundaries of jury districts. See Fla. Stat. Ann. § 40.015 (West 1988).

only to those who command support from a broad cross-section of the community). Yet those are some of the very practices Congress targeted in enacting the amended Section 2. See *Gingles*, 478 U.S. at 45. A proper application of Section 2 of the Voting Rights Act requires that, once dilution is found, a serious effort be made to craft an appropriate remedy. Such an effort does not permit automatic deference to all aspects of the State's "judicial model." Rather, the State should be given an opportunity to propose an adequate remedy, which the court may alter insofar as may be necessary to cure the dilution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 94-1463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JESSE L. NIPPER, *et al.*,
Petitioners,

v.

JIM SMITH, SECRETARY OF STATE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITIONERS

The petitioners submit this brief in reply to certain points made in the respondents' opposition. As noted in the petition, in the United States' *amicus* brief, and in this reply, certiorari is appropriate in this case for several reasons, including the conflict between the Eleventh Circuit's decision and this Court's holding in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), the need to resolve various issues left open by *Houston Lawyers' Ass'n*, and the Eleventh Circuit's erroneous extension of this Court's decision in *Holder v. Hall*, 114 S. Ct. 2581 (1994).

I. THE CONFLICT WITH *HOUSTON LAWYERS' ASS'N* WARRANTS REVIEW OF THE ELEVENTH CIRCUIT'S DECISION.

Respondents contend that the Eleventh Circuit's decision complies with *Houston Lawyers' Ass'n* because the court of appeals conducted a "fact-intensive, intensely

localized analysis" which weighed the plaintiffs' proof of vote dilution against Florida's interest in maintaining a "partial Missouri plan" for selecting judges. Br. at 8. This argument mischaracterizes the Eleventh Circuit's decision as well as Florida's judicial election system.

All six judges of the en banc majority concluded that there could be no Section 2 violation in this case because any remedy would depart from the State's "judicial model." App. at 70a-82a; 103a-112a; 113a. Under the inquiry set forth in Parts III(A) and III(B)(1) of Chief Judge Tjoflat's opinion, in which all the members of the Eleventh Circuit majority joined, the availability of a remedy that comports with the State's "judicial model" is a *threshold* issue which determines whether plaintiffs have satisfied the first *Gingles* precondition,[1] and the Section 2 inquiry is at an end if the court concludes that any possible remedy would depart from the State's "model." App. at 76a-82a. According to this analysis, there is no need to weigh vote dilution, regardless of its severity, against the State's interest, because the State's "model" precludes any remedy.

Although Chief Judge Tjoflat's opinion for two judges concluded that plaintiffs in this case had proved vote dilution, he did not weigh this vote dilution against the State's interest as part of the totality of circumstances, but expressly held that the State's interest "has *minimal relevance* in the totality of the circumstances analysis in this case". App. 103a (emphasis added). Chief Judge Tjoflat went on to say that any remedy which disturbed Florida's current system would "undermin[e] the administration of justice" in Florida and was therefore unacceptable. App. at 112a. In light of that conclusion, even the most severe case of vote dilution would be insufficient to establish a Section 2 violation under Chief Judge Tjoflat's analysis. Indeed, despite finding that plaintiffs had proved actual racial bias in the voting community, Chief Judge Tjoflat's opinion never mentioned

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[1] *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

this evidence of vote dilution in conjunction with his discussion of the State's interests. App. at 103a-112a. Judge Edmondson's opinion for the other members of the Eleventh Circuit also did not weigh the evidence of vote dilution, but instead declined even to reach the issue of whether plaintiffs had proven vote dilution.[2] App. 113a.

The Eleventh Circuit's "judicial model" theory would preclude plaintiffs in any state or locality from successfully challenging at-large trial court elections under Section 2. Indeed, the Court never defines what it deems the irreducible components of Florida's "judicial model," but simply rejects, in *ad hoc* fashion, any potential remedial alternatives that would require a change in any feature of the current system. If the Eleventh Circuit is correct that all potential remedies would depart from the State's "judicial model" in Florida, they would depart from such a model in all of the states that utilize at-large trial court elections. While the respondents and Chief Judge Tjoflat mention Florida's non-partisan elections and system of appointment to mid-term vacancies, nothing in any Section 2 remedy would alter those features; elec-

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[2] Respondents quibble with characterizing the racially polarized voting in this case as "severe." Br. at 2. But the undisputed statistics are reprinted in the district court's opinion, App. at 53c-54c, and show that black voters gave from 73% to 98% of their vote to black judicial candidates while white voters gave from 67% to 97% of their vote to the white candidates in these same elections. All of the black candidates in these elections, without exception, were defeated by this white bloc voting, regardless of their qualifications, length of experience, endorsements, bar polls, or any other factor. App. at 25b (panel opinion). Chief Judge Tjoflat's conclusion that the voting community in the Fourth Judicial Circuit is driven by racial bias also reflects the severity of the vote dilution present here. Indeed, *all* of the Eleventh Circuit judges to address the issue found that the district court had committed legal error in finding no legally significant white bloc voting. App. at 99a-102a (opinion of Tjoflat, C.J., joined by Anderson, J.; App. at 14b-21b (panel opinion joined by Hatchett and Kravitch, JJ). Yet the Eleventh Circuit holds that this evidence need not even be weighed in determining petitioners' Section 2 claim.

tions would still be non-partisan and appointments could be used for mid-term vacancies under any potential remedial scheme. The potential remedial alterations that allegedly would depart from Florida's "judicial model"—such as using smaller election districts or reducing the use of numbered posts—would be just as much of a departure in other states as in Florida. Thus, the Eleventh Circuit's theory, if correct, would *always* result in the conclusion that at-large judicial elections are immune from a successful challenge under Section 2.

Indeed, by arguing that *Houston Lawyers' Ass'n* requires a "fact-intensive, intensely localized analysis" of the state's asserted interests (Br. at 8), respondents only underscore why the Eleventh Circuit's ruling must be reversed. The district court in this case never undertook the inquiry which the Eleventh Circuit deemed dispositive, and a "fact-intensive" analysis cannot properly be conducted in the first instance by an en banc appellate court. The Eleventh Circuit's decision rests on the conclusion that *all* possible remedies are barred because they would alter the state's "judicial model" and "undermine the administration of justice" in Florida. App. at 77a, 112a. As Chief Judge Tjoflat's opinion itself observes, the district court "did not undertake this inquiry", because the district court "did not equate the first *Gingles* factor with the feasibility of a remedy (as we do in this opinion)". App. at 103a.

Respondents assert that "the issue of a state's interest in its judiciary is a legal one for the court to resolve." Br. at 10. This assertion misses the mark for two reasons. First, *Houston Lawyers' Ass'n* did not expressly determine whether the strength of a state's interest in its election system is an issue of law or an issue of fact, and that question is an open one on which this Court's guidance is clearly needed. The discussion in *Houston Lawyers' Ass'n*, however, makes it clear that if state interests are relevant in determining liability under Section 2, they are merely one factor to be considered under the totality of circumstances inquiry. *Houston Lawyers'*

Ass'n, 501 U.S. at 427. Under *Gingles*, the subsidiary factors that go into making the totality determination are addressed as issues of fact, not of law. 478 U.S. at 78-79. Thus, the structure of the totality inquiry under *Gingles* strongly implies that the state's interests, to the extent relevant at the liability stage, must likewise be determined as an issue of fact, and must then be treated as only *one* factor to be weighed in determining the Section 2 claim.

Second, even if a state's interest in its current at-large system were an issue of law, the court's inquiry still cannot properly be guided by speculation. A proper inquiry depends upon a detailed examination of the actual features of the state's current system and of the possible alternative remedies that could be employed to overcome the vote dilution caused by the at-large system. Such an inquiry must be guided by *evidence* concerning the strength of the asserted state interests, the extent to which the state consistently adheres to those interests, and the precise manner in which each potential remedy would affect those interests. Accordingly, factual development of these issues in the district court is indispensable regardless of whether the ultimate conclusion is deemed legal or factual in nature.

Even with respect to subdistricts—the *only* potential remedy addressed by the district court—the district court's findings do not support the Eleventh Circuit's conclusions. The district court never held that the use of subdistricts would undermine the administration of justice in Florida or even that "linkage" was a compelling state interest. The district court merely stated that the State had a "legitimate" interest in maintaining at-large elections for judges. App. at 46c. Moreover, the only way in which the "linkage" interest would be compromised by subdistricts, according to the district court, was that judges would hear some cases in which one litigant was a constituent and the other was not. App. at 45c. The undisputed evidence showed that the same is frequently

true under the current at-large system, and that judges have been able to act impartially in those circumstances. Tr. Vol. 3 at 198-99; Vol. 5 at 7; App. at 137a (dissenting opinion of Hatchett, J.). Furthermore, the district court expressly *refused* to consider possible remedies that would preserve the state's "linkage" interest:

> Plaintiffs contend that a remedial approach other than subdistricting, such as cumulative voting, would satisfy the state's interests in linking jurisdiction with elective base while promoting greater opportunities for black voters. *The Court has no occasion to consider this contention, since proposed remedies are relevant only if a violation is proved.*

App. at 46c (emphasis added). The district court, in fact, precluded the plaintiffs from presenting evidence of remedial alternatives other than subdistricts. Tr. Vol. 5 at 81.

Thus, the Eleventh Circuit's speculation about how various remedies would allegedly infringe the State's interests is simply unsupported by factual development and fact-finding in the district court. Indeed, Chief Judge Tjoflat's opinion gave deference to "interests" which the State itself had never identified or advanced below, such as maintaining jury assignment rules that would allegedly be affected if the State created new judicial circuits. App. at 108a-109a.

By contrast, Chief Judge Tjoflat's discussion of state interests (Part V of opinion) gave no consideration to *undisputed* evidence of Florida's compelling state interest in overcoming discrimination in judicial elections. As a Florida commission concluded in official reports issued in 1990 and 1991, the underrepresentation of minorities on the bench in Florida is a serious problem which undermines the proper administration of justice in the state court system:

> [T]he underrepresentation of minorities as attorneys and judges serves to perpetuate a system which is,

> through institutional policies or individual practices, unfair and insensitive to individuals of color in the ways described in the Commission's first report . . . . [B]y threatening withdrawal of the tacit 'consent of the governed,' the underrepresentation of minorities in positions of responsibility in the judicial system weakens the very system of ordered liberty upon which our democracy is based.

1991 Report of Florida Supreme Court Racial and Ethnic Bias Study Commission, Pl. Ex. 15 (quoted in panel opinion, App. at 8b); *see also* Pl. Ex. 7 (1990 report). To disregard this officially recognized state interest, while giving dispositive weight to alleged interests supported by no evidence at all, does not remotely comply with *Gingles*' requirement of a "searching practical evaluation of the 'past and present reality,' " 478 U.S. at 79.

As pointed out in the Petition, the Eleventh Circuit's discussion of state interests omits any discussion of other crucial items of evidence as well. The court never mentions Florida's current assignment rules which permit elected judges to sit outside of the area from which they were elected, thus breaking the "linkage" which is alleged to be a crucial state interest. Fla. Stat. § 26.57. The court also never mentions plaintiffs' evidence showing how subdistrict election systems for trial judges are actually working in other states. *See* Petition at 18-19. The court also gave no consideration to some of the available remedies for vote dilution, including the use of subdistrict elections combined with at-large retention elections, which would satisfy any "linkage" interest while requiring only the most modest changes to the state's current system. In sum, the Eleventh Circuit, unassisted by pertinent findings in the district court, simply failed to conduct any meaningful scrutiny of Florida's asserted state interests.

Respondents' brief also mischaracterizes Florida's trial judge election system by calling it a partial "Missouri plan", and claiming that various potential remedies would

interfere with Florida's alleged policy of removing judges from "electoral politics". Br. at 6 (quoting Eleventh Circuit opinion, App. at 13a). Chief Judge Tjoflat's opinion makes the same mistake. App. at 13a, 74a. Florida employs the "Missouri plan" of judicial selection *only* for its Supreme Court justices and District Court of Appeal judges. In conformance with the Missouri plan, *those* judges are selected through appointment only, and are subject to periodic uncontested retention elections, in which voters either approve or disapprove the judge's retention.[3] The present case, however, involves trial judges. The Florida Constitution provides for election of trial judges: "Circuit judges and judges of county courts shall be elected by vote of the qualified electors". Fla. Const. art. V, § 10. Only when a mid-term vacancy arises does the Governor have the authority to make an appointment to a circuit or county court, and then only to a term ending in January of the year following the next primary or general election, when an election must again be held to fill the seat. Fla. Const. art. V, § 11(b). Regular elections are held every two years, meaning that terms filled by appointments to vacancies are generally very short.[4] Thus, even if a portion of the sitting judges initially obtained their seats by appointment to mid-term

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[3] Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla. L. Rev. 529, 530, 537 (1991); Fla. Const. art. V, § 10.

[4] Indeed, even when a mid-term vacancy arises on a trial court, Florida case law establishes that a special election rather than gubernatorial appointment should be used to fill the vacancy when the vacancy occurs sufficiently close to a regularly scheduled election to permit the seat to be filled at that election. *Judicial Nominating Commission, Ninth Judicial Circuit v. Graham*, 424 So.2d 10, 11-12 (Fla. 1982). As the Florida Supreme Court stated in that case, "the constitutional provision [concerning vacancies] was intended to have the election process select members of the judiciary if the electorate had adequate knowledge that a vacancy would occur." *Id.* at 11-12.

vacancies, Florida's Constitution makes all trial judges subject to election at the end of their terms, and the state's express policy is to maintain popular election of trial judges.[5] As the Florida Supreme Court noted in another case, "the citizens of Florida have chosen to retain the power to elect county and circuit judges." *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1335 (Fla. 1990). This choice having been made by the citizens, the State cannot rely upon theories of "judicial independence" to shield its judicial election system from the anti-discrimination requirements of the Voting Rights Act. *Chisom v. Roemer*, 501 U.S. 380, 400-01 (1991).

II. THE ELEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION OF *HOLDER v. HALL* WARRANTS THIS COURT'S REVIEW.

Respondents make no serious effort to defend the Eleventh Circuit's interpretation of *Holder v. Hall*, 114 S.Ct. 2581 (1994), to bar plaintiffs' Section 2 claim. Instead, they contend that this interpretation is not the holding of the Eleventh Circuit, but only of two judges. Br. at 14. That argument is flatly incorrect. All six judges of the *en banc* majority joined the portion of Chief Judge Tjoflat's opinion which read *Holder v. Hall* to impose special requirements in Section 2 judicial election cases (Parts III(A) and III(B)(1)). According to that portion of the opinion, plaintiffs in judicial election cases are required to prove that, "within the state's judicial model, there exists an alternative election scheme that could serve as an appropriate section 2 remedy." App. at 78a.

The court of appeals believed this conclusion to flow from the plurality observation in *Holder v. Hall* that "where there is no objective and workable standard for

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[5] In any event, the route of appointment has not served as a substitute for a more open election system, inasmuch as only one of the 28 circuit judges and one of the 12 county judges was black at the time this case was filed. App. at 6b (panel opinion).

choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dillutive under § 2." App. at 81a-82a, quoting *Holder*, 114 S.Ct. at 2586 (plurality opinion). Of course, this reading of *Holder* is incorrect, because *Holder* recognizes that no "benchmark" problem is presented in challenges to multimember at-large election systems, where no challenge is being made to the size of the elected body. 114 S. Ct. at 2589-90 (O'Connor, J., concurring in part and concurring in the judgment). The Eleventh Circuit's unwarranted expansion of *Holder* to bar, as a matter of law, any remedy that departs from the state's "judicial model", sets a dangerous and confusing precedent that warrants reversal by this Court.

CONCLUSION

For the reasons stated in our petition, as well as in this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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